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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-944

RICHARD NIXON, *Petitioner,*

v.

WARNER COMMUNICATIONS, INC., and
NATIONAL BROADCASTING CO., INC., *et al., Respondents.*

BRIEF FOR RESPONDENT WARNER COMMUNICATIONS, INC.

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WARNER COMMUNICATIONS, INC., and
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BRIEF FOR RESPONDENT WARNER COMMUNICATIONS, INC.

QUESTION PRESENTED

Whether the public's right to inspect and copy court records—specifically, those portions of tape recordings of presidential conversations that were entered into evidence and played in open court during the trial of *United States* v. *Mitchell,* Cr. No. 74-110 (D.D.C. 1974)—is outweighed by the purely personal interests of Richard Nixon.

STATEMENT

A. Introduction

The respondents in this case have applied for permission, as members of the public, to inspect and copy those tape recordings of presidential conversations that

were played in open court as part of the evidence in the Watergate Cover-Up trial. The petitioner's opposition to these applications has posed a question fundamental to the operation of our democratic system and to our concept of public justice: will the narrow and purely personal interests of former President Richard Nixon be permitted to thwart the centuries-old right of the American public to inspect and copy court records?

The Court of Appeals has held that those tape recordings of presidential conversations that were played at the Watergate Cover-Up trial are part of the public record of the District Court and thus subject to the public's right of access. Any conceivable countervailing interest of justice that might have been served by denying the public access to these materials has been stripped away by this Court's refusal to review the convictions in *United States* v. *Mitchell, cert. denied,* 45 U.S.L.W. 3764 (May 23, 1977) (Nos. 76-793, 1081), and by its decision upholding the constitutionality of the Presidential Recordings and Materials Preservation Act in *Nixon* v. *Administrator of General Services,* 45 U.S.L.W. 4917 (June 28, 1977).

It need hardly be added that this case arises in an historical context that is totally unprecedented in the history of the United States, a context that commands deference to the public's right to be informed. Not only is the subject matter of this case the principal evidence used to convict some of the most powerful public officials ever to be charged with crimes in this Nation's history, it is also that evidence solely responsible for compelling the first President of the United States to resign his office in mid-term.

By granting the American public access to these materials, this Court will not only reaffirm the age-old right of the public to inspect and copy official court records, it will also serve the larger interest of providing the American people and their posterity objective and unfiltered evidence of the historic abuses of governmental power that have come to be known as "Watergate."

B. The Watergate Break-In and Events Surrounding the Production of the Subpoenaed Tape Recordings

On June 17, 1972, five men employed by the Committee to Re-elect the President were arrested while installing electronic bugs on telephones in the headquarters of the Democratic National Committee located in the Watergate office building in Washington, D.C. Three months later, on September 15, 1972, those five individuals, along with E. Howard Hunt and G. Gordon Liddy, were indicted on federal charges related to the Watergate break-in. *United States* v. *Liddy,* Cr. No. 1827-72 (D.D.C. 1972). On January 8, 1973, all of the defendants except Liddy and James W. McCord entered guilty pleas. McCord and Liddy were convicted by the jury on January 30, 1973.[1]

On June 25-29, 1973, former Counsel to the President John W. Dean III testified before the Senate Select Committee on Presidential Campaign Activities ("the Ervin Committee") and accused then President Nixon of knowing about and participating in a con-

[1] Those convictions were affirmed. *United States* v. *Liddy,* 509 F.2d 428 (D.C. Cir. 1974), *cert. denied,* 420 U.S. 911 (1975); *United States* v. *McCord,* 509 F.2d 334 (D.C. Cir. 1974), *cert. denied,* 421 U.S. 930 (1975).

spiracy to impede the FBI's investigation of the Watergate break-in.[2] On Monday, July 16, 1973, H. R. Haldeman's chief deputy in the White House, Alexander P. Butterfield, testified before the Ervin Committee and described the elaborate system for tape recording conversations that had been installed by order of President Nixon in the Oval Office of the White House and in Nixon's private office in the Executive Office Building.[3]

As a result of Butterfield's testimony, on July 23, 1973, Special Prosecutor Archibald Cox, acting on behalf of the June 1972 grand jury, caused a subpoena *duces tecum* to be issued to Mr. Nixon. That subpoena required Mr. Nixon to turn over to the grand jury tape recordings of eight meetings and one telephone call. In a letter to Judge Sirica dated July 25, 1973, Mr. Nixon advised that the tape recordings would not be provided, arguing that as President he was not subject to compulsory process from the courts.

On August 29, 1973, Judge Sirica ordered that the requested tapes be turned over to him for *in camera* inspection. *In re Subpoena to Nixon,* 360 F. Supp. 1 (D.D.C. 1973). On October 12, 1973, the Court of Appeals affirmed Judge Sirica's decision upholding the validity of the subpoena. *Nixon* v. *Sirica,* 487 F.2d 700 (D.C.Cir. 1973). That decision was not appealed.

On Saturday, October 20, 1973, President Nixon directed that Special Prosecutor Cox be fired. Attorney General Elliot L. Richardson and Deputy Attorney

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[2] *Hearings Before the Senate Select Committee on Presidential Campaign Activities,* 93d Cong., 1st Sess., Book III, p. 911 (1973).

[3] *Ibid.,* Book V, p. 2073.

General William D. Ruckleshaus resigned, and Solicitor General Robert H. Bork, then Acting Attorney General, carried out the President's order. Three days later, on Tuesday, October 23, 1973, Mr. Nixon, through his attorney, informed Judge Sirica that he would, in fact, comply with the Court's order requiring that the tapes be turned over. In early November, the White House submitted original recordings of seven of the nine subpoenaed tapes and informed the Office of the Special Prosecutor that two of the requested tapes of presidential conversations were missing.[4]

On March 1, 1974, seven individuals, including former Attorney General John N. Mitchell, former Assistant Attorney General Robert C. Mardian, White House Chief of Staff H.R. Haldeman, and President Nixon's top domestic advisor, John D. Ehrlichman, were indicted for, among other things, conspiring to obstruct justice in connection with the government's investigation of the Watergate break-in. Richard Nixon was named by the grand jury as an unindicted co-conspirator.

On April 18, 1974, the new Special Prosecutor, Leon Jaworski, issued a second subpoena *duces tecum* to Mr. Nixon, requiring him to produce for use at the trial of *United States* v. *Mitchell* certain tapes and other documents relating to sixty-four presidential conversations. The Special Prosecutor also requested a protective order to deter mishandling or erasure.

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[4] Certain portions of the tapes turned over as a result of this first subpoena were played during the trial of *United States* v. *Mitchell, supra* (hereinafter "the Watergate Cover-Up trial" or *United States* v. *Mitchell*), and constitute, in part, the subject matter of this case.

On April 29, 1974, in a nationally televised speech, Mr. Nixon released edited transcripts of forty-six tapes, stating, "[E]verything that is relevant is included . . . ." and claiming that "These materials—together with those already made available—will tell it all." *The Washington Post,* April 30, 1974, p. A-8.

On May 20, 1974, Judge Sirica denied Mr. Nixon's motion to quash the Special Prosecutor's subpoena and directed that the tapes be delivered for *in camera* inspection to determine which portions, if any, would be released to the Special Prosecutor for use in the Watergate Cover-Up trial. On July 24, 1974, the Supreme Court unanimously upheld the validity of the subpoena and affirmed Judge Sirica's order. *United States* v. *Nixon,* 418 U.S. 683 (1974).

Three days later, the House Judiciary Committee completed hearings on the impeachment of Richard Nixon and, by a vote of 27-11, approved the first of three articles of impeachment charging Mr. Nixon with obstruction of justice in connection with the Watergate break-in.

On August 5, 1974, the White House released partial transcripts of three subpoenaed conversations between Mr. Nixon and H.R. Haldeman. The transcripts of these June 23, 1972 conversations proved that Mr. Nixon himself had directed that the CIA be ordered to halt the FBI's investigation of the Watergate break-in.

On August 9, 1974, Mr. Nixon resigned his office.

On Sunday, September 8, 1974, Mr. Nixon accepted a full pardon from his successor, President Gerald R. Ford.

C. The Use of the Tapes at the Watergate Cover-Up Trial

In accordance with *United States* v. *Nixon, supra,* attorneys for Mr. Nixon turned over the requested tapes to Judge Sirica who, after listening to them *in camera,* arranged to have a copy made of the admissible and relevant portions. These "edited tapes" were then given to the Special Prosecutor for use at the Watergate Cover-Up trial.

The trial commenced on October 1, 1974. Charles Colson pleaded guilty prior to trial, and Gordon Strachan's case was severed and ultimately dismissed. During the trial most, but not all, of the edited tapes were played—approximately 22 hours worth of tape recordings.[5] Whenever the tapes were played, the jurors, members of the news media, and members of the public in attendance were furnished with earphones and with transcripts prepared by the Office of the Special Prosecutor. Those portions of the tapes that were played were formally entered into evidence; the transcripts were not. The thirteen-week trial concluded with four convictions and one acquittal.

The conviction of Robert Mardian was reversed, *United States* v. *Mardian,* 546 F.2d 973 (D.C.Cir.

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[5] Most of the material played at the trial was obtained pursuant to the April 18, 1974 subpoena *duces tecum* and *United States* v. *Nixon, supra.* Other material obtained under the Special Prosecutor's first subpoena *duces tecum* of July 23, 1973, which was enforced in *Nixon* v. *Sirica, supra,* was also played at the trial.

Only those tapes that were actually entered into evidence and played in open court are at issue in this case. Thus this case does not involve all the subpoenaed material which was the subject matter of *United States* v. *Nixon, supra.* The material that was "edited" out of the tapes by Judge Sirica and those tapes in the possession of the Special Prosecutor that were not played at the trial are not of concern here.

1976), and the Special Prosecutor chose not to proceed further against him. The Court of Appeals affirmed the convictions of John Mitchell, H. R. Haldeman and John Ehrlichman, *United States* v. *Haldeman, et al.*, No. 75-1381 (D.C.Cir. Oct. 12, 1976), and this Court refused to review those convictions, *cert. denied*, 45 U.S.L.W. 3764 (May 23, 1977) (Nos. 76-793, 1081).

D. The Applications to Inspect and Copy the Tape Recordings

On September 17, 1974, in anticipation of the beginning of the Watergate Cover-Up trial, Fred Graham of CBS News, Carl Stern of NBC News, and David Schoumacher of ABC News wrote a letter to Judge Sirica requesting, among other things, that they be permitted to copy portions of those tapes played during the course of the trial for use in national news coverage by the electronic media.

On October 2, 1974, Judge Sirica wrote a letter to Graham, denying the request of the newsmen and enclosing a memorandum from Chief Judge George H. Hart, Jr. (A. 9-10). Judge Hart stated that he had consulted with "many of the Judges of this Court" who agreed that the "most troublesome aspect" of Graham's proposal was the fact that the media would be permitted to play "a precise reproduction of what occurred in Court when the tape was played." (A. 10-11).

On November 12, 1974 the three broadcasting companies and the Radio Television News Directors Association—joined later by the Public Broadcasting System—filed a joint application before Judge Sirica claiming a constitutional right to copy the tapes that were being played at the trial. (A. 12-17, 18-21). Because of his involvement in the ongoing trial, Judge

Sirica referred the application to Chief Judge Hart, who in turn referred it to Judge Gesell. (A. 17-18). Judge Sirica ordered the Clerk to assign the application to the miscellaneous civil docket and invited interested parties to respond. (A. 22).

None of the defendants in the trial voiced any objection to the granting of the application. The Special Prosecutor filed a response in which he stated that he did "not foresee that the rights of the defendants or of the United States to a fair trial would be jeopardized if the motion is granted, and accordingly [the Government] does not oppose the motion." (A. 27-29).

Mr. Nixon opposed the application, arguing that broadcasting the tapes would "have the effect of further intruding on the policies underlying the privilege of confidentiality for presidential communications, of further invading Mr. Nixon's privacy, of further embarrassing him and others . . . and of further invading the privacy and causing embarrassment to persons or groups not participating in the conversations but who are mentioned therein . . . ." (A. 31).

On December 2, 1974, Warner Communications, Inc. filed a separate application claiming that the applicants were entitled to copy the tapes on non-constitutional grounds as well as for constitutional reasons. Referring to the common law and statutory right of the public to inspect and copy court records, Warner argued that the Court had both the power and the discretion to grant the application, that public policy and the public interest strongly favored access, and that there were no substantial reasons to deny the applications. (A. 39-46).

E. Judge Gesell's Rulings

In his Memorandum and Order of December 5, 1974, Judge Gesell upheld the applicants' right to inspect and copy the tapes for release to the public. 386 F. Supp 639 (D.D.C. 1974). According to Judge Gesell, the application did not present valid First Amendment issues but instead posed the "far simpler" question of whether broadcast media along with the general public were entitled "to aural copies of exhibits after they have been received in evidence in a criminal trial as a normal concomitant of the [Sixth Amendment] requirements of a public trial." *Id.* at 641.

Judge Gesell found that the "long standing" custom in the United States District Court for the District of Columbia was to respect the common law right of the public "to inspect and obtain copies of all court records, including exhibits while in the custody of the Clerk . . . ." Judge Gesell added that, "Absent special circumstances, *any* member of the public has a right to inspect and *obtain copies* of such judicial records." (Emphasis in original.)[6]

In Judge Gesell's view, no "special circumstances" appeared in this case. Mr. Nixon's interest in avoiding embarrassment was insufficiently compelling to defeat the public's traditional right of access, and Mr. Nixon therefore "has no right to prevent normal access to these public documents . . . . His words cannot be retrieved; they are public property and his opposition is accordingly rejected." 386 F.Supp. at 642.

[6] In a footnote, Judge Gesell hinted at the existence of equal protection considerations, stating, "Were this an action in mandamus, rather than an application to instruct the Clerk as to Court policy, the media would have standing to compel equal protection of their right of access consistent with that routinely accorded other members of the public." 386 F. Supp. at 641 n.2.

As to other interests, Judge Gesell noted that none of the defendants in the Cover-Up trial had objected to the release of the tapes, the Special Prosecutor had voiced no objection, and Judge Sirica had not "indicated any reason to deviate from general practice in this instance in the interests of a fair trial." *Ibid.*

Militating in favor of full disclosure was the fact that the Watergate Cover-Up trial was of transcendent public interest and historical importance. "[A] criminal proceeding involving officials holding high positions of public trust must peculiarly remain open for the closest scrutiny and discussion by citizens. It was in just such situations that the Sixth Amendment was intended to have its greatest thrust." *Ibid.* Judge Gesell's conclusion was unambiguous. "[T]he aural atmosphere, emphasis and connotations of the taped discussions may be peculiarly illuminating. The law must be applied and the fact the evidence is in aural form is of no special consequence. The tape exhibits are in evidence and have therefore come into the public domain and the public should have the opportunity to hear them." *Ibid.*

Judge Gesell did not grant the applicants' request for immediate access to the tapes, however. Because considerable time was required to reproduce the tapes for release, and because court personnel and experts were already fully occupied with the conduct of the Cover-Up trial, Judge Gesell ordered that "[N]o attempt should be made to provide verbatim sound copies . . . until after the trial." *Id.* at 643.

Judge Gesell invited suggestions as to an appropriate method for release, and he listed a number of considerations that the parties should take into account. Special care should be taken to assure that those portions of the tapes not played to the jury were not released to the public. The integrity of the original tapes as they were admitted into evidence had to be preserved. And, since the Office of the Clerk of the Court was not equipped to become involved in any mass release of numerous copies, a responsible agency had to be found which would, without profit or overcommercialization of the evidence, establish a fair and equitable system of distribution, accommodating all categories of applicants without favoritism. *Ibid.*

On December 18, 1974, Mr. Nixon moved to certify Judge Gesell's ruling of December 5 so that an immediate appeal might be taken. Judge Gesell denied the motion on January 6, 1975.

Meanwhile, in response to Judge Gesell's Memorandum and Order of December 5, 1974, the applicants filed a joint proposal with the Court that endeavored to comply with the criteria for release set forth in Judge Gesell's opinion. (A. 47-55). In an order issued on January 8, 1975, Judge Gesell announced that the applicants' proposal was not acceptable. 386 F.Supp. at 643-644. Judge Gesell stated that the applicants' proposal failed to identify a responsible agency or person other than the Clerk of the Court to administer the plan, and that the Court was not equipped with the necessary funds, technology or manpower to undertake the task itself. Judge Gesell also criticized the applicants' proposal for failing to consider ways to minimize commercialization or undignified use of the tapes.

All pending applications were therefore denied without prejudice, and the matter was transferred back to Judge Sirica "for any further action that may be appropriate in the premises at some later date." *Id.* at 644.

F. Judge Sirica's Decision

On April 4, 1975, Judge Sirica entered a Memorandum Opinion and Order which dealt "solely" with "the narrow issue of the timing of the release, if ever, of certain tapes received in evidence in the case of United States v. Mitchell, et al." 397 F.Supp. 186, 187.

Judge Sirica noted that all four of the defendants convicted in the Cover-Up trial had filed notices of appeal. "Absent some compelling reason, the Court should not take any action which carries the risk of causing possible prejudice to the rights of the defendants should a retrial be necessary." *Id.* at 188. Referring to allegations of Mr. Nixon's attorneys that copies of the tapes "would be put to untold varieties of inappropriate and scandalous uses," Judge Sirica concluded that the rights of the convicted Watergate defendants "might be seriously and permanently damaged as a result of granting the applicants' request for immediate release of the tapes." *Ibid.* The court thus held that release of the tapes "and any further implementation of the December 5, 1974 Order is *delayed* until the appeals in the *Mitchell* case are decided." *Id.* at 189 (emphasis supplied). The respondents appealed.

G. The Decision of the Court of Appeals

On October 26, 1976, the Court of Appeals affirmed Judge Gesell's decision that the public should be given access to the tapes and reversed Judge Sirica's deci-

sion that access should be delayed until after the appeals of the convicted Watergate defendants had been concluded. 551 F.2d 1252 (D.C. Cir. 1976).

The Court agreed with Judge Gesell that the general right of the public to inspect and copy public records extended to judicial records and that the public's right to inspect judicial records was well established in the District of Columbia. The Court noted that the common law right of access to such records is "not some arcane relic of ancient English law. To the contrary, the right is fundamental to a democratic state." *Id.* at 1258. The Court did not address the applicants' constitutional arguments but recognized that the common law right protected important constitutional interests. The Court specifically referred to certain First, Fifth and Sixth Amendment interests "to underscore the importance of the values that the common law right seeks to protect." *Id.* at 1259.

In response to Mr. Nixon's claim that the tape recordings were not judicial records, the Court said that logic and experience—along with the Federal Rules of Appellate Procedure and the *Manual for the Clerks of the United States District Courts*—indicated otherwise. *Ibid.* The Court acknowledged that exhibits are generally returned to their owners after a case is concluded but observed that that practice has no bearing on whether the public should be given access to exhibits while they are in the Clerk's custody.[7] The Court con-

[7] Actually, the tapes at issue here are not the original tape recordings of presidential conversations, but copies of the originals, which themselves remain in the custody of the Administrator of the General Services Administration. Two copies of the originals were prepared, with inadmissible or irrelevant portions deleted. One copy was provided the Special Prosecutor, and one copy was retained by the trial court. Under respondents' proposed plan for implementing the Court of Appeals decision, a master set of tapes (from which all subsequent public copies would be made) would be prepared by copying from the Special Prosecutor's copy of the White House tapes. The original White House tapes and the copy in the court record would not be touched. *See* App. 3 to Opposition to Petition for a Writ of Certiorari; 551 F.2d, at 1256; A. 24-25 (Affidavit of James F. Davey, Clerk of the District Court); A. 29 n.3 (Memorandum of the Special Prosecutor) (noting that because there was more than one copy of the tapes in existence, duplication procedures would not interfere with the orderly presentation of evidence or threaten the integrity of the original recordings).

cluded that "the common law right to inspect and copy judicial records extends to exhibits." *Id.* at 1260.

The Court observed, however, that the public's right of inspection is not—nor has it ever been considered—absolute. The decision as to when judicial records should be closed to the public "necessarily rests within the sound discretion of the courts, subject to appellate review for abuse." *Ibid.*

The Court found that Judge Sirica had abused his discretion in delaying public access to the tapes. Because the common law right of access may only be abridged when "justice so requires," Judge Sirica misconceived the nature of his discretion when he required the applicants to demonstrate a "compelling reason" for exercising their rights. The Court stated that Judge Sirica should have asked whether Mr. Nixon, "who sought to interfere with a fundamental common law right, had sustained his burden of demonstrating that justice required denying access to the court records." *Id.* at 1261. The Court of Appeals concluded that "'the *risk* of causing *possible* prejudice' at a *hypothetical* second trial" did not justify infringing the applicants' right to inspect and copy the tapes. *Ibid.*, quoting 397 F. Supp. at 188 (emphasis in original).

After reversing Judge Sirica's decision on the "narrow issue" of "the timing of the release," the Court of Appeals addressed Mr. Nixon's claims with respect to privacy and deference to presidential conversations. Because the tapes had already been played in a public forum, the Court concluded that Mr. Nixon sought to protect something other than an expectation of privacy. It appeared to the Court that Mr. Nixon's real interest was in preventing further embarrassment as a result of increased public access to the evidence of his and his associates' criminal misconduct. This interest, the Court found, was "not a substantial basis for infringing the common law right to inspect judicial records." 551 F.2d at 1263. The Court added that if preventing this kind of embarrassment were a valid interest, it could always be invoked to block the public's right to inspect records in criminal cases. The fact that the transcripts had already received wide circulation minimized the degree of any additional invasion of Mr. Nixon's privacy. Moreover, since the conversations involved "the conduct of the Presidency," they were "impressed with the 'public trust,' and of prime national interest." *Id.* at 1264. The Court of Appeals further held that no executive privilege or deference owed Presidential conversations barred release of the tapes, since their contents were no longer confidential. The Court concluded that Judge Gesell did not abuse his discretion in deciding to permit the public to inspect and copy the tapes. *Id.* at 1264-1265.

Judge MacKinnon dissented with respect to that portion of the opinion dealing with prejudicial publicity and agreed with Judge Sirica that delay in release of the tapes would result in a "significant *reduction* in the possibility of prejudice to a fair trial."

551 F.2d at 1265-1266 (emphasis in original). Judge MacKinnon did not register any disagreement with that portion of the Court's opinion which upheld the fundamental right of the public to inspect and copy the tapes.

H. Warner's Interest in Copying the Tapes

Warner Communications, Inc. is a diversified company principally engaged in the communications business. It is a leading manufacturer of phonograph records and tapes through its subsidiaries, Warner Bros. Records Inc. and Atlantic Recording Corporation, and its Elektra/Asylum/Nonesuch Division. Through a network of branch distribution offices throughout the United States and in many foreign countries, Warner subsidiaries distribute records and tapes all over the world. Warner also produces and distributes motion pictures, television programs, cable television systems, paperback books, magazines and periodicals.

Warner seeks permission to copy the tapes for the purpose of disseminating them to the public by means of phonograph and tape recordings.[8] Shortly after Judge Gesell's decision upholding the legal basis for

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[8] We describe the uses to which Warner intends to put the tapes solely to indicate that there is nothing "undignified" about them; indeed, Warner's proposed uses will serve substantial educational and historical functions. *See* Part II. A *infra*. However, the common law right of access recognized in the District of Columbia does not require any showing by the applicant of a "legitimate interest" or "special interest" in the records requested. *See* 386 F. Supp. at 641 & n.2; 551 F.2d at 1257. Rather, it is a right that may be exercised by *any* member of the public for any reason whatsoever.

its application, Warner publicly announced that it intended to manufacture and distribute two separate sets of tapes. First, Warner would prepare a complete edition of the 22 hours of tape recordings and make them available to schools, libraries and the public without profit. Second, Warner would prepare a two-record edition containing excerpts from the tapes and explanatory narration for sale to the public.[9]

SUMMARY OF ARGUMENT

In Part I of this brief, we demonstrate that the public's common law right to inspect and copy public records extends to official court records, which include exhibits entered into evidence during the course of a criminal trial. As members of the public, the respondents are therefore entitled to inspect and copy those tape recordings of presidential conversations that were played in open court and entered into evidence during the Watergate Cover-Up trial.

In Part II of this brief, we argue that the public's right to inspect and copy these court records protects important constitutional and statutory interests which, in the context of a trial as historically and politically significant as the Watergate Cover-Up trial, supply additional compelling reasons for this Court to enforce the public's right of access.

Granting complete public access to these tape recordings will serve the vital First Amendment interest of

[9] The director of the project for Warner is Michael Kapp, who prepared a previous documentary album entitled "To the Moon." Audio consultant to the project is John G. McKnight, who served as a member of Judge Sirica's Advisory Panel on the White House tapes. The consultant for the narrative text on the two-record set is Walter Pincus.

promoting a fully informed and enlightened public opinion. These tapes were responsible for the pressures that led Mr. Nixon to resign the Office of President in mid-term. Public understanding and acceptance of the unprecedented events surrounding Mr. Nixon's resignation require public familiarity with this evidence.

Granting complete public access to these tape recordings will also serve the critical Sixth Amendment interest of promoting the search for truth and safeguarding the judicial process. These tapes were the principal evidence in *United States* v. *Mitchell,* and were responsible for a former Attorney General of the United States being convicted and sentenced to prison, an event without precedent in American history. Public disclosure of these tapes will explain, justify and validate the verdicts in that case. The American public will be able to hear with its own ears and thereby understand the evidence that decided the fate of some of its highest and most powerful officials.

In addition, release of these materials will advance the objectives of the Presidential Recordings and Materials Preservation Act without short-circuiting or in any way violating the safeguards outlined in that statute.

In Part III of this brief, we argue that the right to inspect and copy exhibits introduced as evidence in open court in a criminal trial is constitutionally mandated by the First Amendment. Thus it may only be abridged for compelling reasons not present in this case.

If viewed as a common law rather than a constitutional right, the right to inspect and copy court ex-

hibits is not absolute, and the Court of Appeals held that it may be denied in particular cases if "justice so requires." The Court of Appeals held, however, that no interest asserted by Mr. Nixon was sufficiently weighty to vitiate the public's right of access to the tapes. In Part IV of this brief, we argue that no public interest or any other broad interest of justice would be served by denying the public access to this evidence.

Release of these tapes will not violate any executive or presidential privilege, which is premised on the need for confidentiality in presidential decisionmaking. These tapes have already been played in open court at a criminal trial, and transcripts of their contents have been released to the public and widely circulated in the press. Any privilege that might once have attached to these materials was lost, waived or forfeited long ago. In addition, these tapes have already been accorded the "high degree of deference" mandated by *United States* v. *Nixon*. All irrelevant or inadmissible portions have been excised, and only those conversations directly related to the crimes involved in the Cover-Up trial remain. Nothing in *United States* v. *Nixon* imposes any restriction on the treatment of these tapes after they have lost the mantle of executive privilege and are introduced into evidence at a public trial, and nothing in that opinion demonstrates any desire on the part of the Court to restrict public access to and knowledge of the contents of the tapes once the privilege has been defeated.

Nor will release of the tapes affect the "fair trial" rights of any criminal defendants. Judge Sirica's concern that release be delayed pending the Watergate Cover-Up appeals has been mooted by this Court's re-

fusal to review those convictions. Mr. Nixon, who was granted a presidential pardon, is in no position even to raise the issue, since his trial rights are not involved. In any event, the Court of Appeals correctly held that there had been an abuse of discretion in delaying release once the trial and sentencings had been completed.

Similarly, no legitimate personal interest of Richard Nixon requires that public access to the tapes be denied. It is now indisputably clear that Mr. Nixon has no property interest in the tapes, and any claim based on his alleged right of ownership must be rejected. Nor will release of the tapes invade Mr. Nixon's privacy. Conversations relating to the conduct of the Presidency—or, as in this case, showing abuses of the powers of the Presidency—may be privileged but they are never private. Even if a privacy interest did attach to these materials, that interest was utterly defeated long ago. Part of the public has already heard the tapes as they were played in the courtroom. Much of the public has already read the contents of the tapes as they were reported in the press. What remains for dissemination is the difference between a transcript and a recording, hardly constituting a significantly more offensive intrusion on the participants' expectation of privacy. In short, the Court of Appeals correctly held that Judge Gesell did not abuse his discretion in deciding to permit the public to inspect and copy the tapes.

It is useful to list those issues that are *not* present in this case:

—The question of who owns the original tapes or the copies in the court's custody is not at issue in this case;

—The question of whether a court is required in all instances to grant the public access to exhibits introduced in open court is not at issue in this case;

—The question of whether the press or the public has a right to record, film, televise, photograph, or in any way electronically reproduce any judicial proceedings is not at issue in this case;

—The question of appropriating copyrighted material or other valuable property interests is not at issue in this case;

—The question of prejudicial publicity infecting future trials is not at issue in this case.

The central issue in this case is whether the narrow personal concerns of Mr. Nixon and his continuing interest in avoiding embarrassment and obloquy for his misconduct as a public official are sufficiently weighty to bar members of the public from exercising their long-standing right to inspect and copy official court records.

ARGUMENT

I. AS MEMBERS OF THE PUBLIC, RESPONDENTS HAVE A LEGAL RIGHT TO INSPECT AND COPY COURT RECORDS, INCLUDING THESE TAPE RECORDINGS.

The tapes at issue here are part of the official public records of the United States District Court. They were received in evidence and played in open court during a public criminal trial. Transcripts of the recordings have received widespread public dissemination. From the time of their introduction into evidence until now, these tapes have not in any sense been "under seal."

The petitioner concedes that members of the public, under common law as well as federal statute, have an affirmative right of access to court records. This precious right has its roots in English law, where tenants of a manor could always inspect the court rolls and books of the manor to ascertain their titles, *Rex* v. *Shelley,* 3 Term R. 141, and where citizens could inspect the books and papers of a borough to determine the limits of a mayor's authority, *Rex* v. *Babb,* 3 Term R. 579. As early as 1635, Lord Coke observed with respect to court records:

> "These records, for that they contain great and hidden treasure, are faithfully and safely kept (as they well deserve) in the King's Treasury. And yet not so kept but that any subject may for his necessary use and benefit have access thereunto, which was the ancient law of England, and so is declared by an act of Parliament in 46 E 3."[10]

The public's common law right of access to court records is fully recognized in the District of Columbia. In *Ex parte Drawbaugh,* 2 App. D.C. 404 (1894), the Court of Appeals, quoting Professor Greenleaf's treatise on *Evidence*, stated:

> "'It has been admitted, from a very early period, that the inspection and exemplification of the *records of the King's courts is the common right of the subject* . . . . [A]ny limitation of the right to a copy of a judicial record or paper, when applied for by any person having an interest in it, would probably be deemed repugnant to the genius of American institutions.' . . . [A]nd any attempt to maintain secrecy, as to the records of the court, would seem to be inconsistent with the common

[10] Quoted in Annot., Access to Judicial Records, 175 ALR 1260, 1261.

understanding of what belongs to a public court of record, to which all persons have the right of access, and to its records, according to long established usage and practice." 2 App. D.C. at 406-408 (emphasis in original).[11]

Already deeply entrenched in the common law, the right of the public to inspect and copy court records draws further strength from statutory authority. The maintenance of public court records is provided for by 28 U.S.C. § 753(b), and the right of public inspection and copying of court records has been reinforced by directives of the Judicial Conference issued under 28 U.S.C. § 457.

This Court has frequently recognized that the public policy of the United States strongly favors public knowledge of legal proceedings in courts of record and dissemination of court records by the press. *See, e.g., Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 491-496 (1975), and cases cited therein; *Sheppard* v. *Maxwell,* 384 U.S. 333, 349-350 (1966). As the Court pointed out in *Estes* v. *Texas,* 381 U.S. 532, 542 (1965), quoting Judge Cooley,

> "The law . . . favors publicity in legal proceedings, so far as that object can be attained without injustice to the persons immediately concerned."

A. The Tapes in Evidence Are Court Records to Which the Public's Right of Access Applies.

The courts below have uniformly agreed on the applicability of the public's common law right of access to the materials at issue in this case. In so doing they

[11] *Drawbaugh* is still the law. *See District of Columbia* v. *Baker-smith,* 18 App. D.C. 574 (1901), and, most recently, *United States* v. *Burka,* 289 A.2d 376 (D.C. App. 1972).

have thoroughly rejected Mr. Nixon's contention that the common law right to inspect and copy court records does not extend to exhibits introduced in a criminal trial. In his Memorandum and Order of May 5, 1974, Judge Gesell noted:

> "As a matter of practice in this court, if requested, a copy of any document or photograph received in evidence is made by the Clerk and furnished at cost of duplicating to any applicant, subject only to contrary instructions that may be given by the trial judge at the time of trial. This privilege of the public to inspect and obtain copies of all court records, including exhibits while in the custody of the Clerk, is of long standing in this jurisdiction and reaches far back into our common law and traditions. Absent special circumstances, *any* member of the public has a right to inspect and *obtain copies* of such judicial records." 386 F.Supp. at 641 (emphasis in original).

The Court of Appeals confirmed Judge Gesell's view:

> "The common law has long recognized a right to inspect and copy public records. In England, the right was narrowly circumscribed, and only a limited number of persons enjoyed it. But the American courts tended to view any limitation as 'repugnant to the spirit of our democratic citizens,' and therefore granted all taxpayers and citizens access to public records. It was the courts' view that 'no sound reason could be advanced for depriving a citizen of his right; for it is evident that the exercise thereof . . . will serve as a check upon dishonest public officials, and will in many respects conduce to the betterment of the public service' . . . . [This] common law right to inspect and copy judicial records extends to exhibits." 551 F.2d at 1257, 1260.

Exhibits are classified as "auxiliary case records" in the *Manual for Clerks of the United States District Courts,* §§ 201.1, 201.2(F)(1) (Admin. Off. U.S. Cts. 1966), which was promulgated by the Judicial Conference of the United States under authority of 28 U.S.C. § 457. Thus, exhibits are among "[t]he most important records" in the custody of the Clerk. *Id.* § 201.1. Moreover, "in those cases involving crimes of significance to the history of the country," the *Manual* directs district court clerks to retain on file for public inspection for ten years *a full record* of the case in order "[t]o secure a more complete picture of proceedings . . . ." *Manual, supra,* Ch. 13. Ex. 2, at 2, 16 (1954). (Emphasis supplied).[12]

[12] Both Judge Gesell and the Court of Appeals agreed that the official court record of the Watergate Cover-Up trial was historically significant within the meaning of the *Manual*'s language and that the words "a full record of the case" included the tape exhibits that were entered into evidence during that trial:

> "In this particular instance this general right to have access and copy exhibits is especially reinforced by directives of the Judicial Conference of the United States issued under authority of 28 U.S.C. § 457. The Clerks of Court for District Courts throughout the United States are specifically instructed to retain on file for public inspection for ten years documentation in cases of significant historical importance and then to deposit such materials with the Federal Records Center under the aegis of the General Services Administration for subsequent years under the guidelines set by 44 U.S.C. § 3301 and the implementing regulations appearing at 41 C.F.R. §§ 101-11.101 et seq. Administrative Office of U. S. Courts, Manual for Clerks of United States District Courts, Chapter 13, Exhibit 2, (Ref. 1301.4) at pp. 4-5, item 6(a) (1954), directs, among other things, that 'case papers and documentary exhibits' filed in criminal cases involving the President or officials appointed by the President must not be disposed of even after ten years. Cases of this type are considered to contain 'documentary evidence of movements of historical forces' and 'biographical data' of obvious importance for persons interested in 'social, economic and political research.' *Ibid.*, note to item 6, p. 16." 386 F. Supp. at 641-642; *see* 551 F.2d at 1259.

Further buttressing the *Manual*'s inclusive definition of official court records is Rule 10(a) of the Federal Rules of Appellate Procedure. That provision is entitled "Composition of the Record on Appeal", and it states, in relevant part: "The original papers *and exhibits* filed in the district court . . . shall constitute the record on appeal in all cases." (Emphasis supplied.) Rule 11(a) states: "The record on appeal, *including the transcript and exhibits* necessary for the determination of the appeal, shall be transmitted to the court of appeals . . ." (Empnasis supplied.) And Rule 38(1) of the Rules of this Court provides that "models, diagrams, and *exhibits* of material *forming part of the evidence* taken in a case, and brought up to this court for its inspection, shall be placed in the custody of the clerk. . . ." (Emphasis supplied.)

Mr. Nixon argues illogically that because some court records are not automatically part of the record on appeal, those items which constitute the record on appeal are not necessarily official court records. (Pet. Br. 20 n. 9). But Mr. Nixon points to nothing that might properly be included in the record on appeal that would not also be classified as an official court record. Common sense and elementary logic suggest that the record on appeal is simply a smaller category of items included in the larger and more comprehensive category of official court records.[13]

[13] Mr. Nixon misinterprets *England* v. *Gebhardt,* 112 U.S. 502 (1884). (Pet. Br. 20 n.9). In *Gebhardt,* the Court refused to permit the appellants to include in the record on appeal affidavits that were not part of the record of the court below. *See* 112 U.S. at 505. The case certainly does not stand for the proposition that parts of the "record on appeal" are not "court records."

The cases are also clear that exhibits introduced into evidence are court records. In *Allen* v. *Lackey,* 197 Okl. 513, 188 P.2d 215, 217 (1947), the court said: "Exhibits . . . are a part of the court's records and as such are in the custody of and subject to the control of the court." In *Ex parte Drawbaugh, supra* at 406, the Court of Appeals noted that "all the papers and documents" constituting part of the files in a case "become public judicial records . . . and must be so treated." That definition is certainly broad enough to cover a documentary exhibit such as the tapes at issue here. And in *Sloan Filter Co.* v. *El Paso Reduction Co.,* 117 F. 504, 506 (D. Col. 1902), the court granted public access to court exhibits, stating that "inspecting and taking copies of public records is as old in the law as the records are old." *See also, e.g., Chicago Title & T. Co.* v. *Hagler Spec. Sch. Dist.,* 178 Ark. 443, 12 S.W.2d 881, 883 (1929) (filed depositions are part of court record); *LeClair* v. *New England Tel. Co.,* 294 A.2d 698 (N.H. 1972); *New York Post Corp.* v. *Liebowitz,* 2 N.Y.2d 677, 163 N.Y.S.2d 409, 143 N.E.2d 256 (1957); *In re Delaware County Newspaper Publishers' Ass'n's Petition,* 48 Pa. D. & C. 1 (Pa. C.P. Ct. 1943).

1. Court "ownership" of an item is not a prerequisite to the classification of that item as an official court record.

Mr. Nixon concedes that the public has a common law and statutory right of access to court records but argues that, because exhibits such as the tapes in evidence are not "owned" by the court, they are not "court records." Mr. Nixon criticizes the Court of Appeals for ignoring the "important difference" between materials which actually belong to the court, such as

docket sheets, orders and pleadings, and materials which have been subpoenaed from a third party and belong to someone other than the court, such as the tapes at issue in this case (Pet. Br. 20). He goes further to make the astonishing claim that, even as a matter of discretion, the Court has *no* authority to grant the public access to court exhibits that have been subpoenaed from third parties. (Pet Br. 19, 20-23, 36-37). If adopted, this overbroad and hypertechnical argument would break with clear precedent and established practice.[14]

First, Mr. Nixon has no standing whatsoever to assert any property interest in these tape recordings. *Nixon* v. *Administrator of General Services,* 45 U.S. L.W. 4917 (decided June 28, 1977); *see* pp. 88-90 & n. 75 *infra.*

Second, even if he did have standing to make such a claim, Mr. Nixon can cite no authority for the prin-

[14] Mr. Nixon makes the technical argument that a court has no power to allow inspection and copying of the exhibits in a criminal trial because, like a stolen watch introduced into evidence, they are personal property that must be returned to the owner. That argument may also be answered by a technical response. The tapes that respondents seek to copy are themselves *copies* of the original tapes, which remain in the custody of the Administrator of General Services. The copies were prepared under the aegis of the court, at government time and expense. Even if Mr. Nixon had legal "title" to the original recordings—a proposition that is itself questionable—he does not "own" the physical tapes in the court's possession. And absent any copyright protection—which Mr. Nixon has never asserted—he does not "own" the contents of the copies in the court's possession. In short, the copies of the tapes that respondents seek to inspect and copy *are* the property of the court, not of Mr. Nixon. Thus, even if exhibits that are "owned" by a private party must be returned to that party after the conclusion of judicial proceedings, that principle would not govern the tapes at issue here.

ciple that court *ownership* of an item is a necessary predicate to the classification and treatment of that item as an official court record."[15] Mr. Nixon is similarly unable to cite any authority to support his claim that public access to official court records is restricted to include only those items actually belonging to the court. In fact, the clerk's control over and custody of court records is not premised on any claim of ownership by the court. Nothing appearing in the *Manual for Clerks of the United States District Courts,* for example, even remotely implies that a clerk's power or authority over court records is limited to those materials that are actually owned by the court."[16] What was said in *Nixon* v. *Administrator of General Services,* 45 U.S.L.W. 4917, 4922 n.8 (1977) with respect to "the government" certainly encompasses the inherent power of the courts to take all appropriate actions with respect to the materials under their custody and control, as the interests of justice require:

> "It has been accepted at least since Mr. Justice Story's opinion in *Folsom* v. *Marsh,* 9 Fed. Cas.

[15] Mr. Nixon cites a number of cases to support his contention that owners of subpoenaed materials retain their property interest in the materials *after* the completion of grand jury or court proceedings. (Pet. Br. 21-22 & n.11). None of these cases relates to Mr. Nixon's claim that court exhibits are not official court records. None of these cases deals with the treatment of exhibits while in the custody of the court. None of these cases involves any challenge to the power or authority of the court to provide public access to official court records within the custody and control of the court.

[16] The *Manual for Clerks of the United States District Courts* sets forth some twenty-three different categories of court records. §§ 201.1, 201.2(F) and 201.2(G). No distinction is made between material that is actually "owned" by the court and material that is not; all are official court records, including exhibits. One category of court records, for example, is "Bail and other bonds", § 202.1(F)(2), material which is clearly not "owned" by the court.

> 342, 347 (1841), that regardless of where legal title lies, 'from the nature of the public service, or the character of documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government, to give them publicity, even against the will of the writers.' [Mr. Nixon's] suggestion that the *Folsom* principle does not go beyond materials concerning national security and current government business is negated by Mr. Justice Story's emphasis that it also extended to materials 'embracing *historical* . . . information.' *Id.* at 347. (Emphasis added.)"

Relying on *United States* v. *Monjar,* 154 F.2d 954 (3rd Cir. 1946), Mr. Nixon argues that the clerk of the court is "a mere custodian" of subpoenaed property and has no right to treat that property "in a manner inconsistent with the private interests retained in that property." (Pet. Br. 22). But, as the Court of Appeals pointed out, Mr. Nixon's reliance on *Monjar* is totally misplaced. In *Monjar,* the court did say that the District Court's possession of books, papers and records "is, at least in one sense, that of a mere custodian." 154 F.2d at 957. But the court went on to emphasize: "In making these statements we do not intend to imply that the absolute control of exhibits introduced into evidence in a trial in a district court of the United States does not rest in that court." *Id.* at 958.

The relevant consideration is whether an item is in the control or custody of the clerk, and the rationale of the common law rule applies with as much force to exhibits temporarily in the custody of the court as it does to other court records retained permanently."

[17] Mr. Nixon contends that a court "does not have the right—much less the duty—to retain or dispose of subpoenaed property in a manner inconsistent with the private interests retained in

Simply put, "[T]he public and press have a right to know what goes on in the court room whether the proceeding be criminal or civil." *Florida ex rel. Gore Newspapers Co.* v. *Tyson,* 313 So.2d 777, 793 (Fla. Ct. App. 1975) (overturning the trial court's exclusion of the public from a divorce proceeding involving Jackie Gleason). Exhibits are a critical part of what goes on in the courtroom, and as such are subject to the same common law right of access as are other official court records.

2. The Court of Appeals did not change, extend or expand the right of public access to court records.

Contrary to Mr. Nixon's allegations, the Court of Appeals did not promulgate "an extraordinarily broad construction of the public's right to inspect court records" (Pet. Br. 14), nor did the Court create "a surprising new doctrine" (Pet. Br. 18). In fact, the Court explicitly refused to decide whether the public's right of access to evidence introduced in open court was absolute. 551 F.2d at 1261. Instead the Court observed that "the decision [to close judicial records to the public] necessarily rests within the sound discretion of the courts, subject to appellate review for abuse." *Id.* at 1260.

The court found, however, a presumption in favor of public access to materials entered into evidence dur-

that property." (Pet. Br. 22). If Mr. Nixon is correct, then the courts would be barred even from retaining a copy of documentary exhibits in their permanent files after the close of a case, and the directives issued by the Judicial Conference would be beyond the courts' authority to implement. Indeed, Mr. Nixon's position would require that a court return to the party from whom an exhibit was subpoenaed every copy made of that exhibit; possibly the court would even be under an obligation to retrieve copies of such exhibits from counsel in the case.

ing the course of a public criminal trial which could be overcome only when justice required. The burden was on the party seeking "to interfere with a fundamental common law right" to demonstrate "that justice required denying access to the court records." *Id.* at 1261.[18] As the cases cited by the Court of Appeals indicate, this standard governing the right of access is anything but novel.

The Court of Appeals did not hold, as Mr. Nixon contends, that subpoenaed exhibits are the property of the court. (Pet. Br. 21). Nor did the Court of Appeals hold, as Mr. Nixon contends, that persons responding to subpoenas lose all prior interest in the material they turn over. (Pet. Br. 18). Nor did the Court of Appeals hold, as Mr. Nixon also contends, that a federal district court is *required* in every instance to provide the public with copies of exhibits in a criminal case even if the exhibit materials belong to a third party. (Pet. Br. 18).

In fact, the Court of Appeals arrived at two totally unexceptional conclusions: *first,* that subpoenaed materials which are introduced into evidence as exhibits in a public criminal trial are official court records and therefore subject to the public's common law right of access, and *second,* that the public's common law right of access may be blocked when justice so requires at the discretion of the court, subject to appellate review for abuse.

Mr. Nixon offers a series of hypothetical horribles to support his position that members of the public *never* have a right to inspect or copy exhibits in evi-

[18] The Court of Appeals noted that Mr. Nixon had "not offered a single reason for denying public access to exhibits while they were in the Clerk's custody." 551 F.2d at 1259.

dence, mentioning tapes made from wiretaps and obscene films. (Pet. Br. 15, 35-36). He might have added trade secrets, copyrighted material, and evidence relating to adoption and juveniles generally. To all of these spectres there are two answers. First, they have no relevance to this case. This case involves tapes of statements made by high public officials while in office, which are evidence of a criminal conspiracy and which are material to public understanding of momentous issues concerning the conduct of government. Second, each of the distinguishable problems mentioned above can be dealt with independently on its individual merits. Tapes from wiretaps present no problem because they are covered by statute.[19] The law also makes special provision for the protection of minors in adoption and other cases,[20] and there is extensive statutory regulation of copyrighted material.[21] And, as the Court of Appeals agreed, courts have undoubted power to enter seal orders and other protective orders in the interest of decency, to protect proprietary rights, and for other good and solid reasons.[22]

The opinion of the Court of Appeals was neither broad nor absolute. It involved no great leap forward in doctrine nor did it break with the established practice of the District Court. Instead, it relied on a public right that has been recognized for centuries in Anglo-American law. And the Court recognized that this right, like other common law rights, was hedged by in-

[19] *See* 18 U.S.C. §§ 2510 *et seq.*

[20] *See, e.g.*, D.C. Code §§ 16-311 (adoption); 16-2330 (juvenile cases).

[21] *See generally* Title 17 of the United States Code.

[22] *See, e.g.*, Fed. R. Civ. P. 26(c); Fed. R. Crim. P. 16(c).

herent judicial power to do justice.[23] As to the tape recordings in issue here, the Court simply found that there was no good reason for refusing to apply the common law right, particularly in view of the public character of the transcripts of the tapes.

B. The Public's Right of Access to Court Records Includes the Right to Copy These Tape Recordings.

Mr. Nixon concedes that the public's right of access to court records "requires that the court ordinarily permit inspection *and copying* of court-owned materials." (Pet. Br. 23) (emphasis supplied). The courts have uniformly agreed that "the right to inspect would in many cases be valueless without the right to make copies." *Fuller* v. *State ex rel. O'Donnell,* 154 Fla. 368, 17 So.2d 607, 607 (1944).[24]

But, Mr. Nixon argues, when it comes to public access to court records, the courts "have drawn a sharp distinction between documentary materials and tape

[23] The various hypotheticals posed by Mr. Nixon simply emphasize the virtues of a flexible common law approach to enforcing the public's right of access. The genius of the common law is its capacity for growth and its particularized focus on the facts in the case *sub judice*; the Court of Appeals' opinion is part of the gradual development of a body of case law delineating, in different factual contexts the common law right to inspect and copy public records.

[24] *See also, e.g., Whorton* v. *Gaspard,* 239 Ark. 715, 393 S.W.2d 773 (1965); *State ex rel. Colescott* v. *King,* 154 Ind. 621, 57 N.E. 535, 539 (1900); *Clay* v. *Ballard,* 87 Va. 787, 13 S.E. 262 (1891); *People ex rel. Gibson* v. *Peller,* 34 Ill. App. 2d 372, 181 N.E. 2d 376, 378 (1962).

Moreover, the right to copy includes the right to copy for commercial dissemination. "Such use of the material contained in records often enhances their value to the community." *District Mail Service* v. *Registrar of Motor Vehicles,* 296 Mass. 353, 5 N.E.2d 545, 546 (1937); *Nowack* v. *Fuller,* 243 Mich. 200, 219 N.W. 749 (1928). *See* Part IV.C. *infra.*

recordings." (Pet. Br. 32). Mr. Nixon cites three examples of court-approved limits on public access to tape recordings: first, the practice of restricting public access to the tape recordings of oral arguments in this Court; second, Canon 3A(7) of the Code of Judicial Conduct, which imposes strict limits on "broadcasting, televising, recording or taking photographs in the courtroom"; and finally, the local rules of thirty-nine federal district courts which forbid, *inter alia,* the tape recording of judicial proceedings. (Pet. Br. 32-34).

The examples cited by Mr. Nixon of court-imposed restrictions on the use of tape recording equipment to reproduce judicial proceedings are wholly inapposite to this case. Mr. Nixon ignores the important distinction between tape recordings *of* judicial proceedings and tape recordings of out-of-court conversations which are entered into evidence and played *during* a judicial proceeding.[25] The purpose of prohibiting photographic, broadcast and television coverage of a trial is to ensure that the participants will not be distracted, that the dignity of the proceedings will be maintained, and that the nature of the proceedings will not be dramatized or distorted.[26]

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[25] This distinction is explicitly recognized in Canon 3A(7)(a) of the Code of Judicial Conduct, which provides that "[a] judge should prohibit broadcasting, televising, recording or taking photographs in the courtroom . . . [but] may authorize the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration."

[26] Canon 3A(7)(c)(i) and Commentary, Code of Judicial Conduct.

The policies served by limiting the electronic reproduction of court proceedings are in no way endangered or compromised by granting public access to evidence such as the tapes at issue in this case. As Judge Gesell noted, if the respondents are granted permission to copy these exhibits, "There would be no recording in the courtroom." 386 F.Supp. at 640. The tapes at issue here are recordings of Presidential conversations made many months prior to the beginning of the Watergate Cover-Up trial. The dissemination of these tapes could no more destroy the "dignity of [judicial] proceedings"[27] than could the dissemination of the transcripts of those tapes.[28]

Mr. Nixon argues more generally that the right to inspect recorded materials does not include the right to obtain copies of these materials. No authority whatsoever is cited for the proposition that the common law right of access may be bifurcated, that there may be a right to inspect certain court records but not to copy them. Mr. Nixon cites the restrictions that nine federal district courts have allegedly placed on the tape-recorded notes of official court reporters and suggests that because public access to these particular court records is limited, the respondents, by analogy, should not be permitted to copy the tapes at issue in this case. (Pet. Br. 34-35).

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[27] *Ibid.*

[28] Mr. Nixon's reliance on *Amsler* v. *United States*, 381 F.2d 37 (9th Cir. 1967), is misplaced. In *Amsler*, the trial judge's order restricting photographic, broadcast and television coverage of a trial was held to be "a proper precautionary measure to prevent a recurrence of the *Estes* and *Sheppard* cases." *Id.* at 53. For the reasons stated in Part IV.A.2 of this brief, there is no danger that the publication of these tapes would impair the rights of any of the defendants in *United States* v. *Mitchell* to a fair trial.

First, the practice cited by Mr. Nixon is by no means universal. We know of no federal statute or regulation prohibiting members of the public from copying a court reporter's tape recordings, and most federal district courts apparently have left this question to the discretion of the trial judge. The United States District Court for the District of Columbia has no such ban on copying these recordings, and only a small minority of district courts has adopted such a practice. Indeed, Mr. Nixon has distorted even the practice in the nine cited jurisdictions; in seven, there is no restriction whatsoever on public copying of court reporters' tape-recordings of proceedings, and the only use that is prohibited is their "radio or television broadcast."

Second, the practice has nothing whatsoever to do with the issues in this case. The tapes at issue here, which were introduced as *evidence* in a public trial, are entirely different from a court reporter's recorded notes, which do not play any significant role in the proceeding itself.

Third, where the issue has been posed directly, the courts have held that the right to copy includes the right to copy tapes as well as papers. As the Supreme Court of New Mexico observed, "[t]he right to inspect public records commonly carries with it the right to make copies thereof . . . . We are unable to understand why the right to inspect public records should not carry with it the benefits arising from improved methods and techniques of recording and utilizing the information contained in these records, so long as proper safeguards are exercised as to their use, inspection, and safety." *Ortiz* v. *Jaramillo,* 82 N.M. 445, 483 P. 2d 500, 501 (1971). For as Judge Gesell stated,

"the public has a right to inspect and *obtain copies* of such judicial records" as exhibits introduced into evidence, 386 F.Supp. at 641 (emphasis in original), and "the fact the evidence is in aural form is of no special consequence. The tape exhibits are in evidence and have therefore come into the public domain and the public should have the opportunity to hear them." *Id.* at 642.

Mr. Nixon argues further that the public's right of access to recorded court exhibits places the trial judge "in an unnecessarily difficult position" because, with respect to allegedly pornographic movies or tape recordings of wiretapped conversations, the judge will be torn between the defendant's demand for a public trial and the public's demand for copies of the film or tape. (Pet. Br. 36-37).[29] But *blocking* the public's right to copy court exhibits—which the Court of Appeals noted could be done in particular cases if justice required—does not also require *closing* the trial to the public.

Finally, Mr. Nixon objects to the "heavy" burden placed on persons who might have good reason to object to the dissemination of recorded materials. (Pet. Br. 37). That burden, however, is no greater and no less than the burden placed on persons who seek to restrict public access to printed records. The fact that these exhibits are tape recordings does not *increase* the burden of any person seeking to limit access, and there is no reason why the presumption of public access to tape recorded material should be any less powerful than that accorded to documentary material.

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[29] Of course, the same argument could be made with respect to written exhibits, such as an allegedly obscene book.

In sum, none of the various distinctions Mr. Nixon attempts to draw between tape recordings and documentary materials justifies diluting the right of access to the former.

II. THE PUBLIC'S RIGHT TO INSPECT AND COPY THESE TAPE RECORDINGS PROTECTS FUNDAMENTAL PUBLIC INTERESTS.

The public's right to inspect and copy official court records protects public interests no less precious to a democracy than those guarded by the Constitution itself. As the Court of Appeals observed in its opinion below:

> "This common law right is not some arcane relic of ancient English law. To the contrary, the right is fundamental to a democratic state. As James Madison warned, 'A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy: or perhaps both . . . . A people who mean to be their own Governors, must arm themselves with the power which knowledge gives.' Like the First Amendment, then, the right of inspection serves to produce 'an informed and enlightened public opinion.' Like the public trial guarantee of the Sixth Amendment, the right serves to 'safeguard against any attempt to employ our courts as instruments of persecution,' to promote the search for truth, and to assure 'confidence in . . . judicial remedies.' And in the instant case, like the Fifth and Fourteenth Amendments, the right of inspection serves to promote equality by providing those who were and those who were not able to gain entry to Judge Sirica's cramped courtroom the same opportunity to hear the White House tapes." 551 F.2d at 1258 (citations omitted).

These interests are particularly compelling with respect to evidence of criminal activity by high public officials.

A. The Public's Right of Access to Court Records Protects Important First Amendment Interests.

The First Amendment protects "the paramount public interest in a free flow of information to the people concerning public officials, their servants." *Garrison* v. *Louisiana*, 379 U.S. 64, 77 (1964). As former Solicitor General Bork has said, "The core value of the First Amendment to the Constitution is the right of citizens and the press continuously to evaluate their government. That right is meaningful only if they know what their government does and why."[80] Justice Brandeis summed up the constitutional philosophy in his celebrated concurring opinion in *Whitney* v. *California*, 274 U.S. 357, 375 (1927):

> "Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. . . . They believed . . . that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government."

The same principle of free and robust public discussion about governmental affairs is the foundation of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964)

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[80] Interagency Symposium on Improved Administration of the Freedom of Information Act, p. 6 (Department of Justice, Nov. 29, 1973).

and its progeny, under which even false and defamatory statements about public figures, if not published with actual malice, are constitutionally protected.

The tapes sought here are a true and verbatim record of the statements and decisions of public officials. To deny public access to these tapes would be tantamount to withholding from the American people accurate and objective information about one of the most important public events in American history.

1. These tapes are important supplements to the transcripts.

The record contains the affidavits of five persons who listened to the tapes as they were played during the Cover-Up trial, and who have also read the transcripts of the taped conversations. All five are journalists who have specialized in Watergate matters—Hays Gorey of *Time* Magazine, Carol Falk of *The Wall Street Journal,* Glen Elsasser of *The Chicago Tribune,* Finlay Lewis of *The Minneapolis Tribune,* and William J. Eaton of *The Chicago Daily News.* Their affidavits describe numerous specific points on which the tapes are an irreplaceable supplement to the transcripts.

Hays Gorey and Carol Falk give the following examples, among others (A. 76-79, 83-85):

> —Laughter, and phrases like "uh-huh," which are devoid of meaning or ambiguous in the transcripts, have significant meaning on the tapes. The laughter can convey bitterness or good humor. At one point in the trial, John Ehrlichman and James Neal clashed over the meaning of an Ehrlichman "uh-huh." The transcript was ambiguous, but Mr. Ehrlichman's tone of voice on the tape made his meaning unmistakable. Pauses, which are not well noted in the transcripts, can convey on the tapes

> the impact of a statement and a variety of emotional responses.
>
> —Transcripts do not indicate emphasis. For example, in a March 22, 1973 conversation, Mr. Nixon and H. R. Haldeman discuss the possibility that Charles Colson had promised clemency to E. Howard Hunt. At one point, Mr. Haldeman says: "But if Hunt thinks that's what he's been promised . . ." "He'll shut up now," continues Mr. Nixon. Mr. Haldeman responds: "He'll, he *may* shut up now," with an emphasis on "may." As Carol Falk heard the tape, she understood Mr. Haldeman to be saying that Hunt might very well not shut up. That suggestion is important in interpreting Mr. Nixon's subsequent comments.
>
> —In many instances, the transcripts do not show exactly when a statement was made. Simultaneous comments are printed as one statement interrupting another. For interpretive purposes, it is important to know whether a particular statement was really an interruption or rather a simultaneous comment, and whether it was loud enough to have been addressed to the entire group, or was merely an aside, which some of the participants may not have heard.
>
> —The transcripts distort the role of Mr. Nixon. They make him appear tentative and unsure of himself, and give the impression that his subordinates were controlling him. By contrast, the tape recordings present him as firm and very much in charge, at least until sometime in April, 1973 when his voice expresses deep anxiety and he becomes more dependent on his associates, particularly Mr. Haldeman.

Messrs. Eaton, Elsasser and Lewis gave additional examples. (A. 67-72, 73-75, 89-92).[31]

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[31] These affidavits of people who have heard the tapes fully justify

The trial of *United States* v. *Mitchell* involved charges touching the conduct of the government at the highest level and relating to matters of the utmost public importance. Acute public interest in this trial is in no sense tawdry or prurient or sensationalistic, but is instead part of the overwhelming and continuing demand of the public to be fully informed about Watergate. Public understanding of Watergate requires public familiarity with these tapes. As the Court of Appeals observed, "It is conceded that one who listens to the tapes—the inflections, pauses, emphasis and the like—will be better able to understand the conversations than one who only reads the written transcripts that have already been published." 551 F.2d at 1254-1255.

2. These tapes are important sources of oral history which should be available to the public.

Warner seeks permission to copy the tapes for the purpose of disseminating them to the public by means of phonograph records and tape recordings. These

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the conclusion of historian John Hope Franklin:

> "The Watergate trials were, in a sense, a test of the American public's capacity to grasp the full significance of what had transpired at the very highest level of our government. Even in the aftermath of the trials the public cannot know what actually transpired and, thus, cannot reach a satisfactory resolution of the issues involved without access to the same materials, including the tapes, to which the jury itself had access. Free access to the tapes and their free dissemination among interested persons would contribute greatly to the public understanding of the administration of justice at this unusual juncture in our history. The people will decide such matters for themselves; and if their decisions are based on all available evidence they are more likely to reach a sound decision than they would if certain material evidence were denied them." (A. 81-82).

forms of electronic communication are important media for the preservation and dissemination to the public of the sounds of history, as demonstrated by the listing of nearly 150 different documentary records in the comprehensive Schwann Catalogue. On those records, the American public can hear the inaugural addresses of Presidents, the Nixon-Kennedy debates, the United Nations addresses of Pope Paul VI, the voices of Senator Joseph McCarthy, Malcolm X, Winston Churchill and Martin Luther King. And they can hear the sounds of wars, demonstrations, and public ceremonies. Warner's proposed editions of the tapes played at the Watergate Cover-Up trial are in the great tradition of documentary records.

James MacGregor Burns, the Pulitzer Prize winning biographer of Franklin Roosevelt, states in his affidavit, "The utility of oral source materials to historians, biographers, political scientists and other scholars is attested to by the growing number of oral history libraries which have been established, many of which include actual recordings as well as transcripts." (A. 64). Maurice A. Crane, Director of the Voice Library at Michigan State University, testifies to the value of oral history materials to scholars (A. 65-67). The White House Record Library also contains a number of documentary records.

John Hope Franklin is a distinguished historian who was President of the Organization of American Historians and President of the United Chapters of Phi Betta Kappa. He has served on the Advisory Committee of the Oral History Project, and as Chairman of the Committee on Television, of the American Historical Association. In his affidavit, he describes the value of recorded materials for both scholarly work and

teaching. (A. 80-82). Fawn M. Brodie, a biographer of Thomas Jefferson and a Professor of History at U.C.L.A., similarly emphasizes the scholarly and educational value of sound recordings. (A. 59-62).

In additon, the record contains the affidavits of historians and biographers of Presidents McKinley, Wilson, Franklin Roosevelt, Truman and Kennedy. These scholars agree that recorded oral materials are an important source for the study of modern Presidents. (A. 96-98, 93-95, 86-88, 62-65). The historians also agree, on the basis of their research experience, that an edition of the White House tapes relating to the Cover-Up would have immense scholarly value. Professor James MacGregor Burns, a biographer of Presidents Franklin Roosevelt and John Kennedy, comments:

> "The White House tapes played to the jury in *United States* v. *Mitchell* will be of particular importance to historians and biographers because of the peculiar nature of the conversations recorded. It will be recalled that when transcripts of these conversations were released, the conversations seemed somewhat disorganized, fragmented, discursive, jumbled. But it is well known that intelligible conversations may look unintelligible when reduced to formal transcript sequence. I believe that persons listening to the actual conversations would find them far more meaningful than would be possible just from perusing the transcripts. The recordings can capture the interplay of several personalities through means that cannot be made to appear on paper—timing, interruptions, simultaneous comments, communication of emotion through tone of voice, the emotional quality of responses." (A. 64. *See also* A. 95).

There can be no doubt that the First Amendment protects both phonograph records and tape recordings. What the Supreme Court said of motion pictures in *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 501 (1952), applies with equal force to sound recordings:

> "It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform."

There can be no question, then, that deference to the public's common law right of access to these particular official court records will also protect vital First Amendment interests.

B. The Public's Right of Access to Court Records Protects Important Sixth Amendment Interests.

Mr. Nixon acknowledges that the Sixth Amendment guarantee of a public trial benefits "the public by encouraging confidence in our judicial institutions, as well as the particular interest of the defendant in guarding against the arbitrary authority which is more likely exercised in private than under public scrutiny. *See In re Oliver,* 333 U.S. 257, 270 (1948)." (Pet. Br. 44).

Nearly a century ago, Mr. Justice Holmes set down the reasons why the law favors the dissemination to the public of information about court proceedings:

> "Though the publication of such proceedings may be to the disadvantage of the particular individual

concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings. . . .

"The chief advantage to the country which we can discern, and that which we understand to be intended by the foregoing passage, is the security which publicity gives for the proper administration of justice. . . . It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed." *Cowley* v. *Pulsifer,* 137 Mass. 392, 394 (1884) (Holmes, J.).

More recently, in *Cox Broadcasting Corp.* v. *Cohn, supra,* this Court underscored the public interests served by the communications media in disseminating court records:

"In the first place, in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. *Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations.* Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. *With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice. See Sheppard* v. *Maxwell,* 384 U.S. 333, 350 (1966).

". . . The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government." 420 U.S. at 491-492 (emphasis supplied).

On many occasions the courts have upheld the right of the public to be informed about and discuss judicial proceedings, thereby serving both First and Sixth Amendment values. *E.g., Bridges* v. *California,* 314 U.S. 252 (1941); *Pennekamp* v. *Florida,* 328 U.S. 331 (1946); *Craig* v. *Harney,* 331 U.S. 367 (1947); *Wood* v. *Georgia,* 370 U.S. 375 (1962); *Times-Picayune Pub. Corp.* v. *Schulingkamp,* 419 U.S. 1301 (1974) (Powell, J., in Chambers); *United States* v. *Dickinson,* 465 F.2d 496 (5th Cir. 1972); *United States* v. *Columbia Broadcasting System, Inc.,* 497 F.2d 102 (5th Cir. 1974).

The public interest in granting full public access to the court records of *United States* v. *Mitchell* is compelling.[32] Here, as in *Wood* v. *Georgia, supra,* the un-

[32] The public's right to inspect and copy exhibits may be absolutely essential if it is to be fully aware of the basis for a criminal conviction and the legitimacy of judicial proceedings. For example, a document that is the linchpin of the prosecution's case may be identified by a witness, marked as an exhibit and introduced into evidence. Various witnesses may give different accounts of what passages in the exhibit mean, but its actual contents may never be read into the record. If there were no right to inspect and copy

derlying issue "is important not only to an individual or some isolated group or to individual litigants in a particular lawsuit, but affects the entire Nation." 370 U.S. at 392. The trial of *United States* v. *Mitchell* involved the most powerful public officials ever to be brought to trial in the history of the United States. The crimes of which the defendants were convicted involved a conspiracy to obstruct justice through payments of "hush money", perversion of the President's power of clemency, abuse of the President's authority over federal agencies, and other abuses of governmental authority. Now, through the technology of tape recording, the four walls of the crowded courtroom at Constitution Avenue and John Marshall Place can be expanded to include the entire Nation. Full public disclosure of these tapes will explain, justify, and validate the verdicts in *United States* v. *Mitchell*.[33]

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that exhibit, the public—indeed, even those who attend the proceedings themselves—would be unaware of the actual evidence brought into the jury room during its deliberations.

It is also ironic that Mr. Nixon's position might preclude public knowledge of documentary evidence introduced at a public criminal trial while allowing unrestrained dissemination of transcripts of courtroom testimony. Jurors have the exhibits, but not the transcripts of testimony, before them in reaching their verdicts, and every lawyer knows the crucial impact of such exhibits on the outcome of judicial proceedings.

[33] The Sixth Amendment concerns that support the dissemination of the tapes were summarized with striking prescience in *Oxnard Pub. Co.* v. *Superior Court*, 68 Cal. Rptr. 83, 91-92 (Ct. App. 1968):

> "A properly-conducted public trial, in addition to serving the interest of the accused and his connections and the interest of the victim and his connections, maintains the confidence of the community in the honesty of its institutions, in the competence of its public officers, in the impartiality of its judges, and in the capacity of its criminal law to do justice. Public trial has been a basic tenet of our legal heritage, at least since the abolition of the Star Chamber three hundred years ago. Secrecy, on the other hand, is the antithesis of the orderly operation of a public institution breeding either suspicion, distrust, rumor, and outrage, or apathy, indifference, and neglect. Suppose a charge of bribery against a state senator, tax assessor, or member of Congress; suppose a charge of conflict of interest against a councilman, supervisor, or commissioner; suppose the prosecution of the spouse of a judge or the relative of a prominent politician. In each of these cases public confidence in the administration of justice is directly served by the procedure of an open trial which exposes to the scrutiny of the public the conduct of the case and the actions of public officers, police, prosecutors, and trial judges in the performance of their duties. By following the course of events the public is able to evaluate the competence and fairness with which the case is handled. At the conclusion of such a trial deficiencies or excesses in the conduct of public affairs have been exposed for remedial action, and, normally, the public is satisfied that the matter has received an equitable and proper disposition."

C. The Public's Right of Access to Court Records in This Case Will Advance the Objectives of the Presidential Recordings and Materials Preservation Act.

This Court has recently upheld the facial validity of the Presidential Recordings and Materials Preservation Act, Pub. L. No. 93-526 (1974), 44 U.S.C. § 2107. *Nixon* v. *Administrator of General Services*, 45 U.S. L.W. 4917 (June 28, 1977). Title I of that Act provides for archival processing of Mr. Nixon's presidential materials, including tape recordings of White House conversations, and the promulgation of regulations to govern eventual public access to those materials that are not personal and private in nature.[34]

The exhibits that respondents seek to copy are not explicitly covered by the Act, however, since the tape recordings that it governs are the "*original* tape recordings . . ." § 101(a) (emphasis supplied). Respond-

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[34] Such personal and private materials are to be returned to Mr. Nixon. § 104(a)(7).

ents do not seek access to any original tape recordings, but seek to make copies of a *copy* introduced as evidence in a criminal trial. *See* n.7 *supra.* Moreover, § 102(b) provides that notwithstanding any other provision of Title I, "the tape recordings and other materials [covered by the Act] shall, immediately upon the date of enactment of this title, be made available, subject to any rights, defenses, or privileges which the Federal Government or any person may invoke, for use in any judicial proceeding or otherwise subject to court subpoena or other legal process."[35] Thus the Act does not apply to materials that are already in court, and there is no suggestion in the Act that once subject to legal process, tape recordings would not also be subject to the ordinary incidents of that process, including the publicity resulting from a public trial.[36] Indeed, this Court has observed that access regulations issued by the Administrator under the Act would not be the sole means of public access to the tapes: "Aside from the public access eventually to be provided under § 104, the Act mandates two other access routes to the materials. First, under § 102(b), access is available in accordance with lawful process . . . ." *Nixon* v. *Administrator,* 45 U.S.L.W. at 4924 n. 13.

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[35] One of the major purposes of the Act was to preserve the availability of invaluable evidence for judicial proceedings. 45 U.S.L.W. at 4919-4920, 4924-4925, 4931.

[36] The Act as a whole relates to the future disclosure of presidential materials that heretofore have not been made public. It simply has no application to presidential materials that are already public. The congressionally mandated machinery for preservation and cataloguing of presidential materials has no relevance to tapes that have already been screened by a court and played in a public courtroom.

Not only does the Act fail to restrict in any way the public's right to inspect and copy presidential materials that become matters of record through criminal trials, it also clearly embodies a congressional judgment that strengthens the public right of access in this case. In § 104(a), which lists seven factors to be considered by the Administrator in fashioning public access regulations, the first factor listed is "the need to provide the public with the full truth, at the *earliest reasonable date,* of the abuses of governmental power popularly identified under the generic term 'Watergate' . . . ." (emphasis supplied).[37] The primary purpose of the Act was "to provide for the American people an historical record of the Watergate events," 45 U.S.L.W. at 4920 n.4; *see id.* at 4924 n.14, which would serve "the American people's ability to reconstruct and come to terms with their history." *Id.* at 4924. The Act will thus help "to restore public confidence in our political processes by preserving the materials as a source for facilitating a full airing of the events leading to [Mr. Nixon's] resignation." *Id.* at 4925. Con-

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[37] In the most recent set of proposed access regulations, the Administrator acknowledges the central role that this provision plays in governing the timing and priorities of public access. *See, e.g.,* Legal Explanation of Public Access Regulations, Presidential Recordings and Materials Preservation Act, P.L. 93-526, at G-6 to G-11 (June 2, 1977).

The other interests to be considered under § 104(a) are either inapposite or satisfied with respect to these tapes. The tapes have been employed in judicial proceedings. § 104(a)(2). National security information was excised by Judge Sirica, § 104(a)(3), and no one's "fair trial" rights are endangered by release. § 104(a)(4); *see* Part IV.A.2 *infra.* The materials are clearly of historical interest, § 104(a)(6), and Mr. Nixon has had more than an ample opportunity to argue, in a judicial setting, that public access should be limited. § 104(a)(5).

and all irrelevant, prejudicial, and otherwise extraneous matter has been excised. The contents of the tapes have been publicly released and widely disseminated. There has been more than adequate opportunity for Mr. Nixon and others to assert any conceivable objection to release of the tapes. In short, no safeguard provided by the Act would be circumvented by prompt release of the tapes. Copying of the tapes for public distribution at the earliest possible time would not only not be inconsistent with the statute, it would carry out the manifest intent of Congress as expressed in § 104 (a)(1).

III. THE RIGHT TO INSPECT AND COPY TAPE RECORDINGS INTRODUCED INTO EVIDENCE AT A PUBLIC TRIAL IS GUARANTEED BY THE FIRST AMENDMENT.

Because of its reliance on the public's common law right to inspect and copy the tape recordings at issue here, the Court of Appeals did not reach the constitutional issues presented. 551 F.2d at 1259. We submit that, in addition to the right of access provided by the common law, the public's right to inspect and copy tape recordings introduced into evidence at a public trial is guaranteed by the First Amendment.[38]

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[38] The First Amendment was peculiarly fashioned to ensure *informed* decisionmaking by the public, the ultimate sovereigns in this Nation. *E.g.*, *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 762-764 (1976); *Mills* v. *Alabama*, 384 U.S. 214, 218-219 (1966); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). Information pertaining to the actions of government officials and the conduct of governmental affairs is thus essential, for without that information, it is impossible for the public to effectively and intelligently exercise its sovereign power. *E.g.*, *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936); *Thornhill* v. *Alabama*, 310 U.S. 88, 95-96, 101-102 (1940); *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964). *See*

gress recognized that these interests required that materials pertaining to "Watergate" be promptly made available to the public:

> "Clearly, it is in the public interest to provide general public access to the materials to assure a full and accurate account of 'Watergate' and to provide a basis for legislation and executive action to prevent future 'Watergates' . . . ." H. Rep. No. 93-1507, 93d Cong., 2d Sess. 8 (1974); *id.* at 2. "[L]egislation must be enacted promptly to protect and preserve the papers, documents, memorandums, tape recordings, and transcripts originating during the presidency of Richard M. Nixon in order that all facts about the Watergate affair may be made available to the American people and to the courts, prosecutors, and individuals involved in trials arising therefrom." S. Rep. No. 93-1181, 93d Cong., 2d Sess. 6 (1974). *See also, e.g., id.* at 4.

There can be no doubt that the tapes at issue in this case fall squarely within the materials evidencing "abuses of governmental power popularly identified under the generic term 'Watergate'" under the language of § 104(a)(1). The policy objectives of the Act, Congress' manifest desire to ensure and accelerate public disclosure of presidential materials relating to Watergate, will thus be furthered if the public's right of access is granted now.

It is likely that archival screening will delay release of still-confidential materials for several years. But however long or short the period until the Administrator of the GSA commences release of materials in his custody, there is no need to delay release of the evidentiary tapes at issue here. They have already been screened by the trial court in *United States* v. *Mitchell,*

The controlling precedent is *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975), in which this Court, without dissent on the merits, struck down a Georgia statute prohibiting the publication of the name of a rape victim, holding that the right to disseminate material which is part of the public record of a court is protected by the First Amendment. In *Cox Broadcasting,* a television reporter had obtained the victim's name from a public court file. What the Court said about official court records in *Cox Broadcasting* is equally applicable to the tape recordings introduced into evidence in this case:

> "Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business." 420 U.S. at 495: *see id.* at 491-492, quoted pp. 48-49 *supra.*

Mr. Nixon's attempt to distinguish *Cox Broadcasting* from this case is unavailing. He relies entirely on the statement by the *Cox Broadcasting* Court that it did not address the constitutional questions arising

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generally T. Emerson, *Toward a General Theory of the First Amendment,* 72 YALE L.J. 877 (1963); A. Meiklejohn, Free Speech and Its Relation to Self-Government (1948); Z. Chafee, Free Speech in the United States (1931). As the text demonstrates, information on the criminal justice system is particularly important to self-government, serving both First and Sixth Amendment interests. And if any criminal case merits full public knowledge and discussion of *all* the facts, it is this one, for the Watergate Cover-Up trial involved a core question in any democracy—are public officials accountable for their abuse of the public trust?

from a state policy *refusing any public and press access* to court records. *Id.* at 496 n.26. Whatever the ultimate resolution of those questions, they are of no relevance to this case. For the records at issue in this case, like the records in *Cox Broadcasting,* are completely within the public domain.[39] Far from refusing access to court records, the court below permitted the tape recordings to be played in open court and the transcripts to be distributed to the press and to members of the public in attendance at the trial. This is not a case in which records, for whatever policy reasons, are under seal or shielded from public access *ab initio.*

The principles anounced in *Cox Broadcasting* were recently reaffirmed in *Nebraska Press Assn.* v. *Stuart,* 427 U.S. 539 (1976), and *Oklahoma Publishing Co.* v.

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[39] This Court has frequently recognized that the policies of the First and Sixth Amendments strongly favor public knowledge of legal proceedings in courts of record:

> "The principle that justice cannot survive behind walls of silence has long been reflected in the 'Anglo-American distrust for secret trials.' *In re Oliver,* 333 U.S. 257, 268 (1948). A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media for '[w]hat transpires in the court room is public property.' *Craig* v. *Harney,* 331 U.S. 367, 374 (1947). The 'unqualified prohibitions laid down by the framers were intended to give to liberty of the press . . . the broadest scope that could be countenanced in an orderly society.' *Bridges* v. *California,* 314 U.S. 252, 265 (1941). And where there was 'no threat or menace to the integrity of the trial,' *Craig* v. *Harney, supra,* at 377, we have consistently required that the press have a free hand . . . ." *Sheppard* v. *Maxwell,* 384 U.S. 333, 349-350 (1966). *See* also cases cited pp. 47-50 *supra.*

District Court, 45 U.S.L.W. 3599 (1977). In *Nebraska Press Assn.,* this Court held unconstitutional an order prohibiting the press from publishing certain information tending to show the guilt of a defendant in an impending criminal trial. The Court ruled that the First Amendment required that "once a public hearing had been held, what transpired there could not be subject to prior restraint." 427 U.S. at 568. The following Term, this Court found that *Cox Broadcasting* and *Nebraska Press Assn.* compel the conclusion that "the First and Fourteenth Amendments will not permit a . . . court to prohibit the publication of widely disseminated information obtained at court proceedings which were in fact open to the public." *Oklahoma Publishing Co.* v. *District Court, supra,* 45 U.S.L.W. at 3599.[40] This Court thus struck down a state court order prohibiting the publishing of the name or picture of a minor child in connection with a pending juvenile proceeding. The strength of the First Amendment interests at stake is demonstrated by the Court's refusal to honor the state's expressed interest in the confidentiality of juvenile proceedings, as demonstrated by a state statute that required juvenile hearings to be closed unless specifically opened to the public by court order. The Court found that, although no such court order was issued, once a proceeding was in fact made public, the First Amendment prohibited any restrictions on dissemination of information obtained in that

[40] "[T]he press may not be prohibited from 'truthfully publishing information released to the public in official court records.'" 45 U.S.L.W. at 3599, quoting from *Cox Broadcasting,* 420 U.S. at 496. *See also Craig* v. *Harney,* 331 U.S. 367, 374 (1947) ("[t]hose who see and hear what transpired [in the courtroom] can report it with impunity.").

proceeding. Because Mr. Nixon's asserted interests in restricting access to these tapes[41] can hardly be said to be more compelling than the admittedly valid interests in *Oklahoma Publishing Co.,* that case is dispositive of his claim.

Mr. Nixon further relies on a line of cases in which this Court has refused to create a special right of access for the press. *E.g., Pell* v. *Procunier,* 417 U.S. 817 (1974); *Saxbe* v. *Washington Post Co.,* 417 U.S. 843 (1974). That reliance is misplaced.

Pell and *Saxbe* held only that the First Amendment accords the press no greater right of access to inmates of federal and state prisons than it does the general public. That principle is inapplicable here, for this is not a "right of access" case. The tape recordings at issue here are not secret; they are not locked away behind prison walls or kept under seal. Rather, they are part of the public record of the United States District Court for the District of Columbia. Respondents seek only to extend to the general public the opportunity to hear the tapes that have already been heard by a segment of the public—those persons who attended the trial in *United States* v. *Mitchell.* Indeed, the plan submitted to the District Court specifically provides for equal access for *all* members of the public, with no special advantage to the press. The request of respondents is, therefore, wholly different from that of the journalists who sought special access to inmates in *Pell* and *Saxbe,* when that access was not provided to the general public.[42]

[41] See Part IV of this brief.

[42] Moreover, the factual and legal context here is altogether different from that in *Pell* and *Saxbe.* The press claim in those cases

Respondents seek no special "right of access" here. They seek merely to disseminate to the general public truthful "information obtained at court proceedings which were in fact open to the public." *Oklahoma Publishing Co.* v. *District Court,* 45 U.S.L.W. at 3599. This Court's decisions in *Cox Broadcasting, Nebraska Press Assn.,* and *Oklahoma Publishing Company* make clear that the First Amendment guarantees their right to do so."

IV. THE COURT OF APPEALS PROPERLY HELD THAT THERE WAS NO JUST REASON FOR DENYING THE PUBLIC ACCESS TO THE TAPES.

We have argued above that exhibits introduced into evidence in a criminal trial are "court records" that may be inspected and copied by the public. This public right is grounded in the common law, protects fundamental constitutional values and, in the context of the tapes here at issue, derives additional support from a

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was analogous to one under the Freedom of Information Act for information that the government wishes to keep secret. That claim would have required the Court to make, on its own authority, the kinds of public policy decisions which Congress had to make in drafting the Information Act. Here, the guiding principle is simple: it is already established law that the public has a right to inspect and copy the public records of a court, and in this case, the aural public record at issue has already been played to a part of the public.

"The First Amendment right in this case is reinforced by the Sixth Amendment value of public knowledge about a criminal trial. This Court has frequently noted that there is a public right to be informed about and discuss judicial proceedings. *E.g.*, cases cited pp. 47-50 *supra*. That right draws its strength from both the Free Speech and Free Press Clauses of the First Amendment and the Public Trial Clause of the Sixth Amendment. The policy of open government underlying those clauses would be served by recognizing the right to inspect and copy the tapes at issue here.

considered congressional judgment that these materials should be available to the public. Nevertheless, the Court of Appeals acknowledged that the right of access is not absolute, and may be denied in the discretion of the trial court in a particular case if "justice so requires."" In this case, however, the Court of Appeals properly held that there was no just reason for denying the public access to the tapes.

A. No Public Interest Would Be Served By Denying the Public Access to the Tapes.

1. Release of the tapes is entirely consistent with this Court's opinion in *United States* v. *Nixon* and will not violate any executive or Presidential privilege.

Mr. Nixon argues that even if a federal district court generally has discretionary authority to release recorded exhibit materials, it would be "inappropriate" to do so in this case because the tapes at issue are "recordings of confidential presidential conversations"

"The discussion in text will treat the right of access as a common law right that can be limited when "justice so requires"; we demonstrate that the interests advanced by Mr. Nixon cannot even satisfy that relatively relaxed standard for denying access in a particular case. To the extent the public's right to inspect and copy all exhibits and other court records that have been displayed in open court is grounded in the First and Sixth Amendments, the right could obviously be abridged only for *compelling* reasons, and not simply as a matter of trial court discretion. A fortiori, Mr. Nixon has not met that standard. Of course, merely because the right is constitutionally based would not make it absolute. Copyright protection of an exhibit, for example, would still be relevant, as would the obscene or pornographic character of an exhibit. *See Westerman Co.* v. *Dispatch Co.*, 249 U.S. 100 (1919); *New York Times Co.* v. *United States*, 403 U.S. 713, 726 n.* (1971) (Brennan, J., concurring); *id.*, at 731 n.1 (White, J., joined by Stewart, J., concurring). Mr. Nixon has never asserted any copyright interest in these tapes, and he has conceded that his various privacy and property claims are not constitutionally based.

that are entitled to extremely deferential treatment. (Pet. Br. 47). Judge Gesell held that this concern did *not* justify withholding release of these tapes, 386 F. Supp. at 642, and Mr. Nixon does not assert that Judge Gesell abused his discretion; it thus appears that Mr. Nixon is contending that a trial court can never release presidential communications that once were privileged. Indeed, Mr. Nixon's arguments would apply equally to prohibit the release of written presidential communications received in evidence at a criminal trial. Whether Mr. Nixon's claim is founded on some notion of executive privilege or whether it is based on the argument that release would be inconsistent with this Court's opinion in *United States* v. *Nixon*, there is no legitimate basis for distinguishing these tapes from any other material that is admitted into evidence in a criminal trial and hence subject to the public's right to inspect and copy court records.[45]

In *United States* v. *Nixon*, this Court specifically rejected Mr. Nixon's claim of an absolute privilege for confidential presidential communications. 418 U.S.

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[45] Although the Court of Appeals never addressed the question whether Mr. Nixon, as a former President, could invoke executive privilege, the Court did consider the merits of his privilege claim. It is now clear that Mr. Nixon, as a former President, has standing to assert the privilege with respect to confidential advice received from his presidential aides, *see Nixon* v. *Administrator of General Services*, 45 U.S.L.W. at 4921, 4923, but the fact that neither President Ford nor President Carter joined that claim "detracts from the weight of his contention" that release "intrudes into the executive function and the needs of the Executive Branch." *See id.* at 4923-4924. In any event, as we demonstrate in text, even if the assertion of the privilege had been supported by the incumbent in this case, the privilege delineated in *United States* v. *Nixon* and *Nixon* v. *Administrator of General Services* would no longer be applicable to these tapes.

at 705, 707. Rather, the Court delineated a constitutionally based, *presumptive* privilege for such confidential presidential communications. That privilege was grounded on "the values to which we accord deference for the privacy of all citizens" and "the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making." *Id.* at 708. Pervading the entire opinion in *United States* v. *Nixon* was the theme of *confidentiality*, and it is clear that the constitutional privilege was designed solely to protect the confidentiality of presidential conversations.[46] For without the assurance of confidentiality, the public interest would be compromised because there would be a serious impairment of the decision-making process of the Executive Branch and an unwarranted incursion on the President's Article II responsibilities.[47]

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[46] "[T]he importance of this *confidentiality* is too plain to require further discussion. Human experience teaches that those who expect *public dissemination* of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process." 418 U.S. at 705 (emphasis supplied). *See also Nixon* v. *Administrator*, 45 U.S.L.W. at 4923 n.10. "A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be *unwilling to express except privately.*" 418 U.S. at 708 (emphasis supplied). *See also id.* at n.17 (referring to interest in avoiding "compelled disclosure"); *id.* at 709-710 (analogies to other "privileges against forced disclosure"); *id.* at 710 (noting that the President was challenging the subpoena "on the claim that he has a *privilege against disclosure* of confidential communications") (emphasis supplied); *id.* at 711 (referring to "privilege of confidentiality"); *id.* at 712-713.

[47] These principles have been recently reaffirmed in *Nixon* v. *Administrator of General Services*, where the Court reiterated the qualified nature of the privilege, 45 U.S.L.W. at 4923, and the fact

As the Court of Appeals in this case noted, however, "the tapes played at trial are no longer confidential." 551 F.2d at 1265. They have all been played in open court, transcribed, and admitted into evidence at a criminal trial, and their contents have been widely disseminated to the public. Thus, whatever executive privilege might once have attached to these tapes, it has been lost by waiver or forfeiture.[48] Indeed, in a

that it was fashioned to preserve "confidentiality of communications" in order to ensure candid advice in the decision-making process. *E.g.*, *id.* at 4923 n.10.

> "This Court held in *United States* v. *Nixon*, [418 U.S. 683 (1974)] that the privilege is necessary to provide the confidentiality required for the President's conduct of office. Unless he can give his advisors some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends." *Id.* at 4923. *See generally*, *id.* at 4923-4925.

[48] Moreover, in light of the purpose of the privilege—facilitating a free flow of information within the Executive Branch in the performance of Article II functions—the privilege does not attach to materials unrelated to the performance of executive duties. *United States* v. *Nixon*, 418 U.S. at 703-714. *See also Nixon* v. *Administrator of General Services*, 45 U.S.L.W. at 4924 ("In [*United States* v. *Nixon*] the Court held that the privilege is limited to communications 'in performance of [a President's] responsibilities,' 418 U.S., at 711, 'of his office,' *id.*, at 713, and made 'in the process of shaping policies and making decisions,' *id.*, at 708.") A fortiori, the presumptive, qualified privilege cannot protect criminal conduct—abuse of Article II power—engaged in by the President. The tapes at issue are evidence of a criminal conspiracy to obstruct justice, in which Mr. Nixon was a culpable co-conspirator, as to which no legitimate privilege can attach. *Cf. United States* v. *Nixon*, 418 U.S. at 709-710; *Nixon* v. *Administrator*, 45 U.S.L.W. at 4921 (analogizing executive privilege to attorney-client privilege, which clearly does not protect "confidential" communications in furtherance of criminal conduct). *See also* 418 U.S. at 712 n.20, where the Court quoted from *Clark* v. *United States*, 289 U.S. 1, 16

rare concession, Mr. Nixon admits that "[i]t is true, as the respondents note, that these conversations are no longer confidential." (Pet. Br. 50).[49]

Whatever the adverse impact that flows from a disclosure of confidential presidential communications, that impact occurred when the tapes were played at a public trial; there can be no further "confidentiality" interest—and thus no "privilege" justification—for suppressing dissemination of the tapes. In *United States* v. *Nixon*, this Court noted that it could not "conclude that advisors will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution." 418 U.S. at 712. It is ludicrous to suggest that advisors would be less candid because of the possibility that tape recordings of their remarks, having been played in open court at a public trial and quoted and described in the press, will also be disseminated by other means. Because the possibility of additional dissemination cannot have any realistic marginal deterrent effect on candid communications from presidential advisors, such incremental dissemination would not threaten any adverse consequences for the values that the presidential privilege is designed to

(1933), on the analogous principles governing petit jury deliberations:

> "A juror of integrity and reasonable firmness will not fear to speak his mind if the confidences of debate are barred to the ears of mere impertinence or malice. *He will not expect to be shielded against the disclosure of his conduct in the event that there is evidence reflecting upon his honor.*" (Emphasis supplied.)

[49] Inexplicably, Mr. Nixon throughout his brief nevertheless refers to the tapes as "confidential" presidential communications.

protect. Thus, the disclosure that has already occurred undermines any rationale for belated application of the "privilege." [50]

Mr. Nixon nevertheless suggests that the tapes that were introduced into evidence should be treated differently than any other evidence introduced in a criminal trial because this Court stated in *United States* v. *Nixon* that the District Court was "'at *all times* [to] accord to Presidential records that high degree of deference suggested in *United States* v. *Burr*.' *Id.* at 715 (emphasis added)." (Pet. Br. 47-48). But that passage continued as follows:

> ". . . and will discharge his responsibility to see to it that *until released to the special prosecutor* no *in camera* material is revealed to anyone. This burden applies with even greater force to excised material; once the decision is made to excise, the material is restored to its privileged status and should be returned under seal to its lawful custo-

[50] Because this case is so unique, candid advice from Presidential assistants will not be chilled by granting complete access to the tapes. It is unlikely, for example, that confidential advice would be voluntarily given a President in permanent aural form—a medium inherently subject to mass public distribution. After all, Mr. Nixon's advisors were not privy to the fact he was surreptitiously recording their every word, and it is, to say the least, ironic for him to argue that public access should be denied because "none of [his close associates] contemplated public airing of his words." (Pet. Br. 50). *See United States* v. *White*, 401 U.S. 745 (1971); *Hoffa* v. *United States*, 385 U.S. 293 (1966). It is also unlikely that many presidential advisors would be giving advice that constitutes criminal activity; thus they should not fear the possibility that their communications will become court exhibits in a criminal trial, subject to all normal concomitants of being court records. Finally, it is also unlikely that advisors who permit their advice to be recorded would temper their candor merely because, if that advice becomes a matter of public record, it will do so in the exact form in which it was given.

> dian." 418 U.S. at 715-716 (emphasis supplied). *See also id.* at 706.[51]

To be sure, the Court clearly mandated that extraordinary measures be taken to prevent unwarranted incursions on presidential confidentiality. But this was all in the context of a discussion of the "District Court's responsibilities in conducting the *in camera* examination of Presidential materials or communications," *id.* at 714, to determine which materials would remain confidential and which would not. The Court of Appeals recognized that when this Court spoke of the "high degree of deference" commanded by presidential communications, it was referring to the District Court's obligation to *ensure confidentiality* of presidential communications that were either irrelevant or inadmissible in the criminal case. 551 F.2d at 1264-1265.[52] However, once the claimed privilege of confidentiality has been defeated by the needs of justice, and formerly privileged communications have

[51] The Court also stated: "[T]he District Court has a very heavy responsibility to see to it that Presidential conversations, *which are either not relevant or not admissible*, are accorded that high degree of respect . . . ." 418 U.S. at 714-715 (emphasis supplied).

[52] The District Court strictly adhered to this command. As Judge Gesell observed, "Judge Sirica has assiduously removed extraneous material, including topics relating to national security and considerable irrelevant comment relating to persons not on trial. Only portions of the tapes *strictly germane to the criminal proceeding* have been played to the jury." 386 F. Supp. at 642 (emphasis supplied).

Mr. Nixon suggests that this case involves "sensitive" presidential material. (Pet. Br. 16). However, all such material had been excised by Judge Sirica. Of course, evidence of criminal activity will always be "sensitive" to the culprits.

been admitted into evidence, there is no reason why they should not be treated like any other evidence. Once the tapes were turned over to the Special Prosecutor they lost their character as privileged presidential material. Once they were admitted as evidence in the criminal trial, they became part of the court record, and thus became subject to all the normal incidents that attach to evidence of record—they were studied by parties to the proceeding, their counsel, and the jury; they were listened to and observed by those members of the public present in the courtroom; they were quoted and reported to the world by the press; and now they may be copied in accordance with the law and the practice of the trial court.

Thus one wonders, in light of Mr. Nixon's concession that the tapes are no longer "confidential" and his implicit recognition that the underlying rationale for the presidential privilege is now inapposite to these tapes, what special prerogative of the Presidency dictates denial of the public's right of access. We are ultimately told that, in the final analysis, Mr. Nixon's "executive privilege" argument is simply that public dissemination of the tapes would be "unwarranted and inappropriate" because it would constitute a "far more serious intrusion on the sensibilities" of those whose voices appear on the tapes than would publication of the transcripts or reports of their contents. (Pet. Br. 50). But if *United States* v. *Nixon* stands for anything, it is the principle that the President is not above the law. The fact that his "sensibilities", or those of his close associates,[53] would be offended by disseminations of conversations evidencing criminal conduct and breach of the public trust, is no different than would be true in any "ordinary" criminal case.[54] And to the extent the participants in these conversations have been made "unwilling actors," (Pet. Br. 50), they have been made so by Mr. Nixon, not the public.[55]

[53] Other than Mr. Nixon, none of the participants in any of the taped conversations has asserted any privacy or privilege objections to release of the tapes.

Mr. Nixon states that it is "hardly necessary . . . to review here the content of the recordings at issue" and suggests that the Court "[put] aside the substance of the conversations as they relate to the Watergate affair." (Pet. Br. 49). But the content of those tapes cannot be ignored, for their content was the very reason the presumptive privilege was lost.[56] As Judge Gesell stated:

[54] We discuss in greater detail below Mr. Nixon's claim that personal rights to privacy would be violated by public dissemination of these tapes. Whatever the merit of those claims, they do not attach because of any special presidential or executive privilege.

[55] Mr. Nixon states that "the respondents seek to make the participants in these private conversations unwilling actors in their broadcasts and phonographic productions." Of course, these "private" conversations, surreptitiously recorded by Mr. Nixon, were a criminal abuse of the public trust by high government officials. That criminal activity was the reason the tapes were played in a public trial, and the need for public understanding of that abuse of the public trust renders public access more imperative in this case than in an "ordinary" criminal trial. Certainly the participants in these conversations had more of an opportunity to keep their advisory activities "private" by remaining within the confines of the law than did the rape victim whose name could no longer be considered private in *Cox Broadcasting Corp.* v. *Cohn*, *supra*.

[56] Mr. Nixon attempts to treat executive privilege in the abstract, as if these tapes were still confidential and the criminal nature of the communications was still secret. But although the privilege of executive confidentiality may be more resistent to loss or forfeiture than other common law or constitutional privileges, it is

> "Former President Nixon is before the jury as an alleged co-conspirator and his acts, as reflected in the tapes, are pertinent to the theory of the case on which the Special Prosecutor is proceeding. The Court has carefully reviewed transcripts of the tapes in issue. From this review it is apparent that Judge Sirica has assiduously removed extraneous material, including topics relating to national security and considerable irrelevant comments relating to persons not on trial. Only portions of the tape strictly germane to the criminal proceeding have been played to the jury." 386 F. Supp. at 642.

And as the Court of Appeals noted:

> "[W]e deal with conversations between business associates admitted into evidence as proof of criminal misconduct. The embarrassment Mr. Nixon anticipates is largely that which results whenever misconduct or questionable conduct is exposed." 551 F.2d at 1263-1264.

Indeed, the tapes were the main evidence at the Watergate Cover-Up trial; "actual tape recordings of key conversations of the co-conspirators . . . established a wide-ranging conspiracy designed to impede a grand jury investigation. . . ." *United States* v. *Haldeman, et al.*, No. 75-1381, Slip op. 6 (D.C. Cir. Oct. 12, 1976). The conspiracy "amounted to an unprecedented scandal at the highest levels of government," and the indictment named Mr. Nixon as a co-conspirator in this obstruction of justice. *Id.* at 3-4 & n.2." *See generally,*

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still subject to forfeiture. Once the privilege is lost, as in this case, it can no longer serve as a justification for preserving confidentiality and preventing additional dissemination.

[57] "The conspiracy at issue required the coordination and control of a large number of individuals who had knowledge of the events that were being covered up. It also required the conspirators to make regular strategic decisions on how best to proceed to prevent the full story of 'Watergate' from becoming known to the press, prosecutors, Congress, and the public. The tape recordings thus contain discussions of many aspects of Watergate strategy: what would happen if particular individuals were to talk, *e.g.*, Tape Tr. 195, how much knowledge those individuals possessed, *e.g.*, Tape Tr. 306, who was likely to volunteer or be compelled to talk, *e.g.*, Tape Tr. 213-214, 306, 310, what individuals could be dissociated from any responsibility for reprehensible or illegal activity, *e.g.*, Tape Tr. 147, 265-267, 303, 458-459, whether certain officials should assert executive privilege, *e.g.*, Tape Tr. 193-194, whether public statements should be issued and what they might contain, *e.g.*, Tape Tr. 57, whether it was feasible to raise and distribute hush money; *e.g.*, Tape Tr. 131-132, 179, 189-191, whether promises of money or aid had been extended to particular persons, *e.g.*, Tape Tr. 325, and so forth, *see e.g.*, Tape Tr .64, 72, 82, 86, 89-91, 130, 135, 311." *United States* v. *Haldeman*, *supra*, slip op. 134-135.

id. at 3-22. The tapes are thus evidence of criminal misconduct by the public's servants and are "both impressed with the 'public trust' and of prime national interest." 551 F.2d at 1264. Having lost the mantle of executive privilege, the tapes are now entitled to no special protection because of their origins. Indeed, given the content of the tapes and the light they shed on the conduct of the Presidency, there is an even more compelling need than in the ordinary criminal case for the public to exercise its right to inspect and copy these tapes.

Finally, with respect to a claim of executive privilege, it is irrelevant that some parties who will gain access to the tapes, including respondent Warner Communications, will market them. Every time the President makes a public announcement or reveals documents publicly, they become subject to the "commercial" aspects of the free enterprise system. The same

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Mr. Nixon also admits that the "tapes were perhaps the most critical evidence in the criminal case." (Pet. Br. 54).

is true of any material revealed in a public trial.[58] In any event, respondents seek to vindicate the right of every person to obtain a copy of these tapes directly from the court. Whether any particular cause of action, grounded in privacy considerations or otherwise, can be brought against those who republish the tapes is not at issue in this case.[59]

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[58] Because Mr. Nixon has reaped such handsome profits from his abuse of public office and breach of the public trust, he has no legitimate moral standing to cast aspersions on the motives of those who, in marketing the tapes, will at least provide the public with an accurate and truthful version of their contents.

[59] In making his "executive privilege" argument, Mr. Nixon contends that release is sought for the "entertainment of the American public," (Pet. Br. 50); that respondents seek to "exploit" presidential conversations for commercial purposes, *id.* at 15; *see id.* at 50 (release would be "commercial exploitation of the presidential conversations"); and that release entails "undignified commercial exploitation," *id.* at 49. These claims seriously distort the issues actually involved here, for the Court of Appeals simply held that *any* member of the public has the right to obtain a copy of the tapes *directly from the court*, that distribution by the court must be "on an equal basis to all persons desiring copies," and that "neither the court, nor any agent it appoints, should profit from the public's exercise of its common law rights." 551 F.2d at 1265. Moreover, the purpose of release is not public "entertainment," but public enlightenment about Mr. Nixon's abuse of the power of the Presidency; release will facilitate "the American people's ability to reconstruct and come to terms with their history" and "a full airing of the events leading to [Mr. Nixon's] resignation." *See Nixon* v. *Administrator of General Services*, 45 U.S.L.W. at 4924-4925. This is surely neither "exploitation" nor "undignified." In any event, "commercialization" would be an unconstitutional basis upon which to deny the public's rights. *See* Part IV.C. *infra*.

Whether Mr. Nixon has any claim against particular republication of the tapes is not now at issue. But respondent's proposed records will neither be exploitive nor undignified, and will serve as an appropriate historical record of this sad chapter in the life of our Republic. *See* pp. 17-18, Part II.A. *supra*.

2. Release of the tapes will not interfere with the public interest in ensuring fair criminal trials.

In denying the public's common law right to *immediate* access to the tapes,[60] Judge Sirica primarily relied on the possible deleterious impact of release on the rights of the defendants in the Watergate conspiracy case should a *retrial* become necessary for the already-convicted defendants.[61] Indeed the timing of release

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[60] To the extent the right of access is constitutionally based, and to the extent the common law right protects First Amendment values, the delay was particularly egregious. This Court has emphasized, in a plethora of opinions, that the public interest in an informed and enlightened public opinion requires prompt release of information. *E.g.*, *Carroll* v. *Princess Anne*, 393 U.S. 175, 182 (1968); *Wood* v. *Georgia*, 370 U.S. 375, 392 (1962); *Pennekamp* v. *Florida*, 328 U.S. 331, 346-347 (1946); *Bridges* v. *California*, 314 U.S. 252, 268-269 (1941); *International News Service* v. *Associated Press*, 248 U.S. 215, 235 (1918); *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 157 (1967) (plurality opinion of Harlan, J., joined by Clark, Stewart, and Fortas, JJ.). *See also*, *New York Times Co.* v. *United States*, 403 U.S. 942 (1971) (expedited procedures in case involving prior restraint on publication); *cf. Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975). For as the Court has recently reiterated, "the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly." *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 561 (1976). *See also id.* at 609-610 n.39 (Brennan, J., joined by Stewart and Marshall, JJ., concurring); 423 U.S. 1327, 1329 (1975) (In-Chambers opinion of Blackmun, J.).

[61] Judge Sirica also commented on the need to protect the integrity of any evidence to be used in a retrial. Judge MacKinnon, dissenting in the Court of Appeals, voiced similar concerns. However, no such concern was remotely apposite to this case in light of the existence of duplicate copies of the tapes. *See* n.7 *supra*. Since the copying was to be done from the Government's *duplicate* set of tapes, there could be no interference with the record on appeal in the criminal case, or any possible impairment of the evidence to be used in any retrial. Moreover, the affidavit of James F. Davey, Clerk of the District Court, clearly indicated that the copying of the tapes could be done without any disruption of the processes or business of the District Court. (A. 23-27).

was the only issue before Judge Sirica, for Judge Gesell had already ordered that there was a public right to copy the tapes, and that no interest asserted by Mr. Nixon overcame that public right. The Court of Appeals held that Judge Sirica's denial of immediate public access was an abuse of discretion in the circumstances of this case and Mr. Nixon, in seeking certiorari, argued that the Court of Appeals' ruling constituted an abridgment of a trial judge's discretion "to delay any release of the recordings until the appeals in the criminal case and any necessary retrials of the defendants were concluded." (Pet. Writ Cert. 3). In his brief on the merits in this Court, Mr. Nixon no longer presents this as a separate question for review, although he makes a passing argument based on the premise that "because the opinion of the court of appeals gave such hostile treatment to the trial judge's efforts to reduce the risk of prejudicial publicity in a criminal trial, this Court must not allow that precedent to stand, even if the risk of prejudice has now passed." (Pet. Br. 56). Thus Mr. Nixon concedes that the question of undue "pretrial" publicity in the event of Watergate Cover-Up retrials is no longer presented in this case.

Whether the release of exhibits from a criminal trial might prejudice any prospective retrial of the same criminal defendants is obviously only a question of timing—*when* the exhibits should be released, not a question of *whether* they should be released. That question is now moot. The Court of Appeals affirmed the convictions of three of the four defendants in the Watergate Cover-Up trial, *United States* v. *Haldeman, et al.*, Nos. 75-1381, 1382, 1384, 1441 (D.C. Cir. Oct. 12, 1976) (*en banc*), and this Court has denied the defendants' petitions for writs of certiorari. 45 U.S.L.W. 3764 (May 23, 1977). Those convictions are thus final, and the defendants have begun to serve their prison terms. Moreover, the Government decided not to reprosecute Mr. Mardian, the sole cover-up defendant whose conviction was reversed by the Court of Appeals. *See* Government's Motion to Dismiss Indictment, *United States* v. *Mardian*, Cr. No. 74-110 (D.D.C. January 17, 1977). Therefore, there is no realistic prospect of any retrials, and the issue of prejudicial "pretrial" publicity—whether release of the tapes should have been delayed while the cover-up case was pending on appeal—is moot.

In any event, Mr. Nixon has no standing to raise the issue of prejudicial pretrial publicity. He was not a party to the criminal case; nor was he a prospective defendant, in light of the pardon granted him by former President Ford. He has admitted that he has "no direct interest in the criminal case," (Pet. Writ Cert. 9 n.3), and this case surely has none of the features that sometimes justify the assertion by one party of the rights of others. *See, e.g., Singleton* v. *Wulff*, 428 U.S. 106, 112-116 (1976); *id.* at 123-127 (Powell, J., joined by Burger, C.J., and Stewart and Rehnquist, JJ., concurring in part and dissenting in part); *Warth* v. *Seldin*, 422 U.S. 490, 498-501 (1975). None of the Watergate Cover-Up defendants sought review of the Court of Appeals opinion, and all have declined to remain parties to the case in this Court. *See* letter of April 29, 1977 from counsel for Mr. Nixon to all trial counsel in the Watergate Cover-Up case; letter of May 12, 1977 (and attached certificate of service) from counsel for Mr. Nixon to the Honorable Michael Rodak, Clerk, Supreme Court of the United States. Moreover, al-

though at all times represented by extremely able, retained counsel who were served with all papers in this proceeding, including papers pointing out their failure to oppose the applications for copies of the tapes,[9] none of the Watergate defendants raised the issue of prejudicial publicity in the District Court. And although Mr. Haldeman raised the issue in the Court of Appeals, he did so in a *pro forma* one-sentence statement (*see* A. 99), to which the Court of Appeals rightly paid little attention. Finally, the Special Prosecutor has never opposed release of the tapes. Since the only parties whose "fair trial" rights could be affected saw no need to contest release of the tapes, Mr. Nixon cannot be heard to assert their rights.

Even if Mr. Nixon had standing to raise the issue of prejudicial publicity, and that issue were not moot, the Court of Appeals would be correct on the merits of its holding that Judge Sirica abused his discretion in delaying release of the tapes pending the Watergate Cover-Up appeals. As that Court noted:

> "[T]he very fact that a second trial is only a possibility makes the interest in preventing prejudicial publicity less than compelling. If the chance of a retrial justifies interfering with the common law right of access here, then the public can be denied permission to inspect indictments, motions, transcripts, exhibits, or opinions in every case of public importance, at least until all appeals are exhausted." 551 F.2d at 1261 (footnote omitted).[10]

[9] Indeed, the defendants' counsel were even invited by the District Court to appear at the status call on March 6, 1975.

[10] The Court added that a "portion of the news value of such materials may be irrevocably lost by even a temporary delay." 551 F.2d at 1262 n.42. Over 32 months have elapsed since some of the respondents first applied formally for permission to inspect and copy the tapes.

Such open-ended time limits on public access to court records are intolerable. The overwhelming consensus of legal and judicial opinion is that restrictions on the release to the public of information concerning a criminal case should end at the conclusion of the trial or, at the very latest, at the conclusion of sentencing. *See, e.g.*, American Bar Association, Standards Relating to Fair Trial and Free Press (Tentative Draft, Dec. 1966 and Supplement, Mar. 1968) (Reardon Committee Report); Committee on the Operation of the Jury System, Report on the "Free Press-Fair Trial" Issue, 45 F.R.D. 391 (1968) (Kaufman Committee Report); Special Committee on Radio, Television, and the Administration of Justice of the Association of the Bar of the City of New York, Freedom of the Press and Fair Trial: Final Report with Recommendations (1967) (Medina Committee Report); *Craig* v. *Harney*, 331 U.S. 367 (1947); *Wood* v. *Georgia*, 370 U.S. 375 (1962); Local Rule 1-27 of the U.S. District Court for the District of Columbia.

Finally, even if access to judicial records could sometimes be denied on the grounds of potential prejudice to a hypothetical retrial, the Court of Appeals gave cogent reasons why that risk did not justify denying access under the circumstances of this case. First, the Court of Appeals noted that the defendants' silence evidenced a belief that their rights would not be jeopardized, and it observed that "their inaction surely would weigh against them were they later to challenge the impartiality of veniremen or jurors based upon exposure to the tapes." 551 F.2d at 1263. All defendants had ample opportunity to make their views known, but neither they nor their able retained counsel chose to do so. There is clear prece-

dent that the failure of a criminal defendant to take obvious steps to mitigate problems of publicity gravely weakens any argument that he was denied a fair trial by reason of prejudicial publicity. *E.g., Stroble* v. *California,* 343 U.S. 181, 193-194 (1952); *United States ex rel. Darcy* v. *Handy,* 351 U.S. 454, 463 (1956); *Beck* v. *Washington,* 369 U.S. 541, 557-558 (1962).[64] Second, the Court of Appeals noted that the evidence in question was "tape recordings from which inadmissible statements have been carefully eliminated" and which "presumably will be replayed at any retrial." 551 F.2d at 1262.[65] Such evidence poses less of a threat of prejudicial publicity that would infect the impartiality of a jury. *E.g., Stroble* v. *California, supra.* Third, the District Court placed no restrictions on release of any evidence during the trial, and the transcripts were made available to the press and public. As the Court of Appeals noted, the "transcripts of these conversations have received wide circulation and have been reenacted in various forums." 551 F.2d at 1262. The District Court's position thus essentially amounted to the argument that prospective jurors could read the evidence but could not hear it, a position that makes

[64] The Special Prosecutor, representing the interests of the United States, declined to object to release of the tapes both at the District Court and at the Court of Appeals. (A. 28-29 & n.3, 101).

The Special Prosecutor specifically observed that he

> "does not foresee that the rights of the defendants or the United States to a fair trial would be jeopardized if the motion [to grant respondents access] is granted, and accordingly does not oppose the motion." (A. 28-29).

[65] "Appellants are not seeking access to an inadmissible confession, a list of prior convictions, or other prejudicial evidence that, although part of the court's records, was kept from the jury." 551 F.2d at 1262.

very little sense. Finally, the Court of Appeals noted that it seemed "likely that, without undue effort, it would be possible to empanel a jury whose members had never even heard the tapes." *Id.* at 1262 n.46. The court noted that an impartial jury had been empaneled in the original cover-up trial, *see United States* v. *Haldeman et al.,* No. 75-1381, slip op. 22-48 (D.C. Cir. Oct. 12, 1976), despite the phenomenal and widespread publicity engendered by the whole "Watergate affair" over the preceding years.[66] *See Nebraska Press Assn.* v. *Stuart,* 427 U.S. 539, 554 (1976).

Thus, on the record in this case, it is unnecessary and inappropriate for this Court to consider the question of the permissibility of delaying, pending appeal, release of exhibits after a criminal trial has been completed and the defendants have been sentenced. That was the sole issue on which the Court of Appeals found any abuse of discretion by either District Court Judge. In any event, on the merits of that question the Court of Appeals was fully justified in reaching the conclusion that it did.

[66] Massive publicity surrounded the original "Break-In Trial" and the "Ellsberg Break-In Trial", the televised Ervin Committee hearings, litigation involving subpoenas of various White House tapes, televised statements by then-President Nixon, the televised deliberations of the House Judiciary Committee and its vote to impeach Mr. Nixon, and the resignation of Mr. Nixon shortly before trial. Moreover, there have been countless best-selling books, newspaper and magazine articles, and television and radio programs about various aspects of the Watergate affair. The Cover-up trial itself generated additional massive publicity. All of this publicity not only reflects the public interest in "Watergate," but also highlights the comparatively insignificant additional publicity that release of the tapes will generate. If a fair and impartial jury could be empaneled at the first trial, there was no realistic danger that release would prevent the empaneling of another such jury in the event of any retrials.

B. No Legitimate Private Interest of Mr. Nixon Would Be Served by Denying the Public Access to the Tapes.

1. Release of the tapes will not invade Mr. Nixon's right to privacy.

Mr. Nixon claims that he retains a privacy interest in the taped conversations that would be infringed if aural copies of the conversations were publicly distributed (Pet. Br. 26-31). He cites no constitutional, statutory or District of Columbia common law basis for his privacy claims, and his assertion that distribution of the tapes would invade his privacy was rejected by both Judge Gesell and the Court of Appeals. We suggest that there are at least three bases for rejecting Mr. Nixon's privacy claims. First, no personal privacy interest of Mr. Nixon could attach to these tapes, since they constitute recorded transactions of government business conducted by public officials. Second, any privacy interest that Mr. Nixon may once have had in these tapes was clearly lost when they were played in open court in a criminal trial, and when their contents received widespread public dissemination. Third, even if Mr. Nixon now retains some vestigial privacy interest in the tapes, the Courts below did not abuse their discretion in holding that any such interest was not so significant as to justify a denial of the public's right of access in this case.

The tapes at issue in this case are not subject to a claim of personal privacy. During his incumbency, a President is the quintessential public figure, who by voluntarily seeking public office relinquishes any privacy interest in the manner in which he conducts himself in office and in his "use or abuse of [the] public trust." *Sanitation Men* v. *Sanitation Commissioner,* 392 U.S. 280, 284 (1968). Oval office conversations

among public officials and concerning public business may sometimes be privileged, but outside the confines of privilege they are never "private." This principle was clearly recognized as recently as last month in *Nixon* v. *Administrator of General Services, supra,* where the Court upheld the facial validity of the Presidential Recordings and Materials Preservation Act against Mr. Nixon's various challenges, including his claim that the Act invaded his privacy interests. The Court observed that there could be no "privacy" claim as to tape recordings that "related to [Mr. Nixon's] conduct of his duties as President, and [which] were therefore materials to which great public interest attached." 45 U.S.L.W. at 4925.[87]

[87] The Court also observed that "at least when government intervention is at stake, public officials, including the President, are not *wholly* without constitutionally protected privacy rights *in matters* of personal life *unrelated to any acts done by them in their public capacity.*" 45 U.S.L.W. at 4926 (emphasis supplied). The Court gave as examples "matters concerned with family or personal finances," *Ibid.*; Mr. Nixon might have a "legitimate expectation of privacy in *such* materials." *Ibid.* (emphasis supplied). The Court further commented:

> "*The overwhelming bulk of* the 42 million documents and *the 880 tape recordings pertain,* not to [Mr. Nixon's] private communications, but *to the official conduct of his Presidency.* . . . [I]t is logical to assume that the tape recordings made in the Presidential offices *primarily relate to the conduct and business of the Presidency.* And, of course, *appellant cannot assert any privacy claim as to the documents and tape recordings that he has already disclosed to the public.*" (Emphasis supplied.)

As to these "official materials," in contrast with certain "extremely private communications," there can be no valid claim to privacy. *Ibid.* Indeed, there is more than a mere "assumption" that the tapes introduced at the Cover-Up trial relate to the conduct of the Presidency; any reading of the transcripts makes clear beyond peradventure that they reveal a flagrant abuse of the powers of that Office.

The fundamental lesson of Watergate is a democratic lesson: good government is open government, deriving its legitimacy from the informed and enlightened consent of the governed. Public knowledge is an indispensable element of good government under our Constitution. The Constitutional faith is that the people can be trusted with information. When that information reflects the manner in which public officials execute their public trust, it cannot be deemed to be private. The tapes at issue here were found by Judge Sirica to be relevant and material to criminal charges involving alleged misuse of public office by the highest officials in the land. As such, the tapes are peculiarly appropriate for *public* concern and discussion.

In any event, whatever privacy interest may once have adhered to the content of these tapes has been utterly lost. They are evidence of record in a criminal

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The theme that there is no personal privacy interest in materials relating to the conduct of the Presidency was repeated later in *Nixon* v. *Administrator*. "[T]he vast proportion of [Mr. Nixon's] Presidential materials are official documents or records in which [he] concedes the public has a recognized interest." 45 U.S.L.W. at 4927. Thus, although Mr. Nixon "has a legitimate expectation of privacy in his *personal* communications," there is no such expectation with respect to materials bearing on his conduct of the Presidency. *See id.* at 4928. *See also id.* at 4925 (distinguishing "communications relating to governmental duties, and of great interest to historians or future policymakers, [from] private and confidential communications"); *id.* at 4933 and n.* (White, J., concurring) (Mr. Nixon's personal property is property "not involving the actual transaction of government business"; the government would not view as private "the tapes, which actually recorded the transaction of government business by government employees on government time and so on").

trial involving official crimes and abuse of power."[88] The tapes have been published to the world. Their content has been extensively reported in the press, and transcripts may be reprinted or reenacted without limit. As the Court of Appeals noted, "Perhaps the most important point to be made about Mr. Nixon's privacy claim is that he is not seeking to protect an expectation of privacy. The tapes already have been played in a public forum." 551 F.2d at 1263. Part of the public has already heard the tapes in the courtroom. What remains for dissemination to the rest of the public is the difference between a transcript and a recording: voice, inflection, and timing. No privacy interest attaches to such elements. *E.g., United States* v. *Dionisio*, 410 U.S. 1, 14 (1973).[89] In light of the fact that the *content* of Mr. Nixon's conversations has been released to the public, he has no interest recognized by the law of privacy in preventing the most accurate and effective public presentation of that content—from copies of the tapes themselves.

Mr. Nixon acknowledges that his asserted privacy interest is not one of confidentiality, since this has

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[88] Public dissemination of matters of public record is not an invasion of privacy. W. Prosser, *Handbook of the Law of Torts*, at 810-811 (4th ed. 1971). This principle was reaffirmed by this Court in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 489-495 (1975).

[89] *Doe* v. *Roe*, 33 N.Y. 2d 902, 307 N.E. 2d 823 (1973), *aff'g* 42 App. Div. 2d 559, 345 N.Y.S. 2d 560, *cert. dismissed as improvidently granted*, 420 U.S. 307 (1975), which Mr. Nixon cites for the proposition that prior publicity does not vitiate privacy interests, is clearly inapposite. That case involved a private plaintiff, not a public official, and the defendant-author was a psychiatrist who was alleged to have breached statutorily-recognized psychiatrist-patient confidentiality. Moreover, the injunction only issued *pendente lite*. In this case, there is no claim that those who seek access to the tapes have engaged in any wrongdoing.

clearly been lost. (Pet. Br. 27).[70] Rather, he objects be-

[70] Mr. Nixon also recognizes that any "privacy" interest that he has in the tapes would be an insufficient basis to win a tort suit for invasion of privacy at common law. (Pet. Br. 29-30; *see* 551 F.2d at 1263).

This Court's recent opinion in *Zacchini* v. *Scripps-Howard Broadcasting Corp.*, 45 U.S.L.W. 4954 (1977) is clearly inapplicable to this case. In *Zacchini*, the Court held that the First Amendment did not immunize a television station from a tort action, grounded in a State law "right to the publicity value of [a] performance," for damages that may have resulted when it broadcast the "entire act" of an "entertainer" who ordinarily is paid to perform, without obtaining his consent. In this case, Mr. Nixon does not point to any local statutory or common law recognition of a "right of publicity."

More importantly, the interest protected in *Zacchini* was "the proprietary interest of the individual in his act in part to encourage such entertainment"; it focused on "the right of the individual to reap the reward of his endeavors" and "the economic value of that performance," and "did not intrude on dissemination of information to the public" because "[a]n entertainer such as [Zacchini] usually has no objection to the widespread publication of his act as long as he gets the commercial benefit of such publication." *Id.* at 4956-4957. By contrast, Mr. Nixon—a public official charged with public responsibility and accountable to the citizenry, rather than an entertainer engaged in commercial endeavors— has invested no special time, energy or expense in the sound of his voice, and dissemination of the tapes will in no way deprive him of his earning capacity. Indeed, unlike the performance in *Zacchini*, these tapes were never made for the purpose of commercial dissemination. When an individual assumes the Presidency—or any public office—he cannot be deemed to have a compensable interest in his governmental acts; his official salary and possibly the prestige of his office are all that are necessary to compel him to engage in official duties, and no further "economic incentive" should be tolerated. A President cannot, for example, object to the taping and filming of a press conference and its subsequent distribution, even if done for a profit. The tapes at issue in this case are no different; they are verbatim records of official government business. Since they were transacted in confidence, they may have been originally invested with a claim of executive privilege. But absent any valid claim of privilege, the record of an official act is not private property for which a public official can command compensation. At a minimum, it should be

cause dissemination of the recorded conversations would not be "inoffensive." *Id.* at 28. Essentially, Mr. Nixon fears embarrassment from further dissemination of the tapes. Yet that embarrassment is no greater than the embarrassment that may result from public reporting of unseemly facts revealed by courtroom testimony or in written exhibits. Criminal trials always involve the revelation of facts that are embarrassing—or worse. Much that was once confidential and clandestine becomes public knowledge as the evidence in a criminal trial unfolds. The law recognizes no interest in the privacy of such evidence. Certainly it recognizes none when the subject is a public official."[71]

In any event, the Court of Appeals did not hold that the prevention of embarrassment or the protection of privacy interests may never justify restrictions on the public's right of access to public records. Rather, it

clear that a public official cannot claim a "right of publicity" over his official acts.

[71] In *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), the Court held that public officials have no cause of action for damage to reputation unless false and defamatory statements are uttered with actual malice. "'[P]ublic men are, as it were, public property,' and 'discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled.'" *Id.* at 268, quoting *Beauharnais* v. *Illinois*, 343 U.S. 250, 263-264 (1952). There is a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270. *See also, e.g., Near* v. *Minnesota*, 283 U.S. 697, 718-719 (1931); *Bridges* v. *California*, 314 U.S. 252, 270 (1941); *Mills* v. *Alabama*, 384 U.S. 214, 218-219 (1966); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 490 (1975). Indeed, there is a "paramount public interest in a free flow of information to the people concerning public officials, their servants." *Garrison* v. *Louisiana*, 379 U.S. 64, 77 (1964).

held that even assuming such power, Judge Gesell did not abuse his discretion in rejecting the claim of privacy on the facts of this case. 551 F.2d at 1263-1264 (emphasizing, *inter alia,* the fact that the contents of the tapes, which relate to the conduct of the Presidency, have been widely disseminated). Whether or not Mr. Nixon has some "privacy interest" in these tapes that would command common law protection under some circumstances, Judge Gesell and the Court of Appeals surely did not abuse their discretion in deciding that that interest did not overcome the public's right to inspect and copy materials introduced into evidence at a criminal trial involving abuse of official power.

2. Release of the tapes will not invade Mr. Nixon's property rights.

Mr. Nixon asserts that there is no public right to inspect and copy materials subpoenaed from third parties and introduced as court exhibits in a criminal trial; the basis for this claim is that such exhibits are the personal property of the owner, while the court is a "mere custodian". (Pet. Br. 17-23). We have demonstrated above that a court's power to make exhibits available to the public for inspection and copying does not turn upon any technical question of legal title, but is premised on the court's custody and control over the exhibits. To be sure, the public's right of access may be abridged in a particular case if "justice so requires," and certain property principles—for example, copyright protection that has been accorded a particular exhibit—may thereby enter into the court's calculus. But such private property principles do not establish an absolute prohibition on court dissemination of exhibits introduced as evidence in a public criminal trial."[72]

Mr. Nixon implies that even if this Court determines that a trial court has some power—no matter how narrow or broad—to release such exhibits, to do so in this case would "invade" "the property . . . interests of the participants in the conversations." (Pet. Br. 15). This property interest is allegedly "in the sound of [Mr. Nixon's] own voice,"[73] which Mr. Nixon

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[72] Calling the case "perhaps the closest reported case on its facts to this one," Mr. Nixon cites *King* v. *King*, 25 Wyo. 275, 168 P. 730 (1917) for the proposition that court exhibits are personal property that may never be released by the courts. (Pet. Br. 25). *King*, a sixty year old case from a different jurisdiction, involved a clearly distinguishable fact situation. *King* was the spin-off of a divorce proceeding involving private litigants, Margaret and Francis King. In the divorce proceeding, Margaret filed a deposition, attached to which were "personal and private" letters sent from Mary King to Francis King; Margaret King came into their possession "surreptitiously and clandestinely." 168 P. at 731. At the close of the divorce proceeding, by consent of all parties to the action, the deposition and letters were sealed and placed in the clerk's custody. The case from which Mr. Nixon quotes involved Margaret King's subsequent attempt to obtain copies of the letters that she had earlier stolen and still later consented to have placed under seal, and must be understood in that context. Moreover, the right of access in Wyoming was limited to cases falling within the English "special interest" rule, which was rejected long ago by most American courts. *See* p. 25 & n.8 *supra*. Like all of the cases cited by Mr. Nixon in this area, *King* involved the disposition of exhibits *after* the termination of judicial proceedings, not the court's power to make them available for inspection and copying while in the court's custody.

[73] The cases cited by Mr. Nixon for this proposition, *King* v. *Mister Maestro, Inc.*, 224 F. Supp. 101 (S.D.N.Y. 1963), and *Columbia Broadcasting System, Inc.* v. *Documentaries Unlimited, Inc.*, 42 Misc. 2d 723, 248 N.Y.S.2d 809 (Sup. Ct. 1964), do not involve public officials. Moreover, both involved copyright claims, and Mr. Nixon has never alleged that he has a copyrightable interest in these tapes.

asserts is analogous to the "common-law property right in one's personal letters." (Pet. Br. 24-25)."[16] Mr. Nixon thus claims that "the choice of whether to release the recorded conversations belongs to Mr. Nixon, not to the respondents or the court." *Id.* at 26.

Respondent respectfully suggests that if the Court upholds the general power of a District Court to make exhibits available for public inspection and copying in appropriate cases—a power acknowledged by all Judges below—there is no occasion to analyze Mr. Nixon's particular property interests in these tapes to determine whether "justice requires" that they be withheld from copying. Mr. Nixon never raised this issue —as opposed to the general proposition that *no* exhibits can be released because they are not the property of the court—below, and at no time asserted any personal copyright or other proprietary interest in the tapes. Thus, he cannot be heard belatedly to assert that claim now. *See, e.g., Hill* v. *California,* 401 U.S. 797 (1971); *Cardinale* v. *Louisiana,* 394 U.S. 437 (1969). In any event, there is considerable authority for the principle that the public generally rather than a particular public official is the owner of materials generated at public expense and relating to official duties. The argument that Mr. Nixon has no legal title to these tapes was fully canvassed in the briefs on the merits in *Nixon* v. *Administrator of General Services,* and in light of Mr. Nixon's failure to raise this issue below, we will not repeat those arguments, with which the Court is familiar. Should the Court nevertheless decide to resolve this reserved question, *see Nixon* v. *Administrator,* 45 U.S.L.W. at 4922 n.8, we submit

[16] Of course, in this situation the *content* of the tape recordings has been fully disclosed, and is admittedly in the public domain.

that "Presidential" papers belong to the public at large, and not to the particular individual occupying that position of public trust.

More fundamentally, even if Mr. Nixon once had a property interest in these tapes and his other Presidential papers, he no longer has a cognizable property interest to be asserted against the general public. In *Nixon* v. *Administrator of General Services,* the Court upheld the facial validity of Title I of the Presidential Recordings and Materials Preservation Act, Pub. L. 93-526 (1974), 44 U.S.C. § 2107. Under that Act, the Administrator of General Services is to take custody of Mr. Nixon's Presidential papers and original tape recordings and promulgate regulations that "(1) provide for the orderly processing and screening by Executive Branch archivists of such materials for the purpose of returning to appellant those that are personal and private in nature, and (2) determine the terms and conditions upon which public access may eventually be had to those materials that are retained." 45 U.S.L.W. at 4918.

The Court did not, however, address the constitutionality of any "access" regulations, since they had not been fully promulgated. Nevertheless, the Court specifically noted that "Aside from the public access eventually to be provided under § 104, the Act mandates two other access routes to the materials. First, under § 102(b), access is available in accordance with lawful process served upon the Administrator." *Id.* at 4924 n.13. Although Mr. Nixon may assert any "rights, privileges, or defenses" to such lawful process, that clearly cannot include any claim premised on bare legal title. To be sure, Mr. Nixon may assert such rights or interests as privacy or executive privilege, or other

interests which might require that the Administrator return custody of particular tapes or other materials to him. But if *Nixon* v. *Administrator* and the Act mean anything, it is that Mr. Nixon cannot make any argument based on the bare assertion that Presidential materials are "his" rather than the public's."

C. Denying Public Access to These Tapes Because of Potential "Over-Commercialization" Would Be Both Unconstitutional and Inconsistent With the Common Law Right.

In his Memorandum and Order of December 5, 1974 Judge Gesell wrote that "if any release is to be made, it must obviously be accomplished on a basis which does not permit overcommercialization of the evidence. Clearly, all persons, whether or not members of the press, desiring copies must be accommodated without special favoritism or priority." 386 F. Supp. at 643. In his Order of January 8, 1975, Judge Gesell stated: "It is a prerequisite to any plan that commercialization of the tapes or any undignified use of the material be minimized." 386 F. Supp. at 643. Judge Sirica, in his opinion denying the applications for immediate access, speculated about "mass merchandising techniques designed to generate excitement in an air of ridicule to stimulate sales" and about "untold varieties of inappropriate and scandalous uses." 397 F. Supp. at 188.

Mr. Nixon constantly returns to this theme of "overcommercialization" and "mass merchandising," be-

[70] If the government has legal title to such materials, then Mr. Nixon cannot claim them as his personal property. And even if Mr. Nixon had legal title before promulgation of the Act, that Act deprived him of title as to materials that are not "personal and private"; "§ 105(c) [of the Act] assures [Mr. Nixon] of just compensation if his economic interests are invaded." 45 U.S.L.W. at 4922 n.8; *see id.* at 4930-4931, 4932 & n.42.

moaning the prospect of the tape recordings being made available to the public "in permanent form to be played at cocktail parties, to be used in comedy acts or dramatic productions, and otherwise to be exploited for every purpose and in every manner that may occur to the enterprising, the imaginative, or the antagonistic recipients of copies." (Pet. Br. 30). Mr. Nixon argues that this Court in *United States* v. *Nixon* did not intend that tapes of presidential conversations, even if entered into evidence in a criminal trial, "could be broadcast into the living rooms of the American public and enshrined among the Top 40 best-selling phonograph records." (Pet. Br. 49) (*See also*, Pet. Br. 14-17, 33)."[70]

Certainly nothing in this record supports Mr. Nixon's concern about scandalous use of the tapes. War-

[70] Mr. Nixon is not well positioned to complain of "commercial" use of the tapes. This Court can judicially notice an affidavit he filed on or about June 25, 1975 in *Nixon* v. *Administrator of General Services*, C.A. No. 74-1852 (D.D.C.). Although the tapes were created at government expense and relate to the conduct of public affairs, Mr. Nixon explains in that affidavit that they were to be used not for any official purpose, such as enhancing the efficiency of the White House, but for Mr. Nixon's personal commercial purpose—his future memoirs, which would be highly lucrative:

> "The installation of the recording capability for conversation in the Oval Office and Executive Office Building and elsewhere stemmed in large part from a recommendation I received from President Johnson by way of a close mutual friend. President Johnson sent word to me that he had learned that as one of my first actions upon arriving at the White House I had ordered the removal of the recording devices he had installed there. President Johnson said that the recordings he had made of his conversations while President had proved to be exceedingly valuable in preparing his memoirs and he urged that I reinstall the recording devices. Thereafter, I consented that this be done, . . ." Affidavit of Richard Nixon, ¶ 23, pp. 16-17.

ner's publicly disclosed intentions involve no improper use. *See* pp. 17-18 *supra*." Moreover, transcripts of the tapes have been in circulation for over two years, and the record contains no evidence that they have been put to any scandalous use. Sound recordings are no more susceptible to abuse than are verbatim transcripts. In any event, we do not defend against the charge of "overcommercialization" on these grounds. Our proposed order to implement Judge Gesell's December 5, 1974 Memorandum and Order expressly provided for access to the tapes by *all* members of the public on a fair and equal basis at the lowest cost (A. 47), and the same care has been taken in drafting a plan for the tapes' release in response to the Court of Appeals' order of October 26, 1976. 551 F.2d at 1265; *see* Warner's Opposition to Pet. Writ Cert. at A-6 to A-13. Beyond that, we do not know what "overcommercialization" really means or constitutionally could mean.

The bogeyman of "overcommercialization" is not a legitimate issue in this case. If, as we have argued, there are no public or private interests of sufficient weight to overcome the public's right of access to these tape recordings, it would be a gross infringement of the First Amendment to block public access to these materials because of some feared or imagined "scandalous uses" to which they might be put.

The First Amendment protects phonograph records and tape recordings no less than other forms of com-

[11] Judge Gesell noted that the announced plans of Warner Communications, Inc. advanced the congressional, judicial, and executive judgments that materials such as these evidentiary tapes, which shed light on government conduct at the highest levels, should be preserved and made available to the public. 386 F. Supp. at 642.

munication, *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952), and that protection is undiminished by the fact that records and tapes are sold for a profit:

> "It is urged that motion pictures do not fall within the First Amendment's aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit. We cannot agree. That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures." *Id.* at 501-502.

In *Bigelow* v. *Virginia*, 421 U.S. 809 (1975), this Court struck down a statute prohibiting advertisements for abortions:

> "The central assumption made by the Supreme Court of Virginia was that the First Amendment guarantees of speech and press are inapplicable to paid commercial advertisements. Our cases, however, clearly establish that speech is not stripped of First Amendment protection merely because it appears in that form. . . . *The existence of 'commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment.' . . . The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.*" *Id.* at 818, 826 (citations omitted) (emphasis supplied).

Indeed, "commercial speech" has received explicit constitutional protection in a wide variety of contexts. *E.g., Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Lin-*

mark Associates v. *Township of Willingboro,* 45 U.S. L.W. 4441 (1977); *Carey* v. *Population Services Int'l,* 45 U.S.L.W. 4601 (1977); *Bates* v. *State Bar of Arizona,* 45 U.S.L.W 4895 (1977).

Just as the First Amendment's guarantee of free speech and a free press may not be conditioned on an absence of commercial motive, the public's right to inspect and copy these official court records should not be contingent upon members of the public putting these court records to limited, approved uses."[18]

The courts, and the government generally, have no role to play in supervising the "tastefulness" or "dignity" with which matters are communicated to the American public.[19] Any attempt to play such a role would constitute an imposition of censorship and prior restraint. In *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546, 553 (1975), this Court noted: "Our distaste for censorship—reflecting the natural distaste of

[18] Any attempt to prevent a constitutionally protected medium from earning a profit would be indistinguishable from the newspaper gross receipts tax held unconstitutional in *Grosjean* v. *American Press Co.,* 297 U.S. 233 (1936). Nor is publication for a profit in any way demeaning to judicial or other government documents. Judicial opinions are routinely published for a profit by West Publishing Company and other business firms, and Mr. Nixon's version of the tapes released in transcript form on April 29, 1974 received wide commercial distribution, apparently with Mr. Nixon's consent.

[19] The Court of Appeals noted that Mr. Nixon's objection as to the "unseemliness" of public distribution of the tapes was "essentially a question of taste, and provide[d] a singularly weak basis for a court to interfere with the exercise of a long-established common law right. Indeed, a substantial argument could be made that it is highly appropriate for recordings of conversations concerning the conduct of public business to be marketed to the public, or at least no more inappropriate than for transcripts of the conversations to be marketed." 551 F.2d at 1265.

a free people—is deep-written in our law." And more recently, in *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 209, 215 (1975), the Court stated:

> "But when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. . . . '[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'"

Erznoznik, Southeastern Promotions, Ltd., and the cases cited therein demonstrate that this Court, at least in the past, has condemned governmental censorship based on notions such as "inappropriateness" or "scandalousness". As the Court observed in *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415, 419 (1971), "so long as the means are peaceful, the communication need not meet standards of acceptability." "[I]t is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Cohen* v. *California,* 403 U.S. 15, 25 (1971). In *Cohen,* the Court held that the First Amendment protects the public display of a four-letter expletive. Similarly, blasphemy is constitutionally protected. *Winters* v. *New York,* 333 U.S. 507 (1948). Crude political hyperbole is protected. *Watts* v. *United States,* 394 U.S. 705 (1969). In the obscenity area, even under *Miller* v. *California,* 413 U.S. 15 (1973), much that is offensive, distasteful and undignified can pass constitutional muster.

The fact that the immediate concern here is the release of court material does not create a power to regulate subsequent use of that material. Certainly, the

government could not condition release of a text or tape of the State of the Union Message or another government document on an agreement by recipients to treat it only in a "tasteful" and "dignified" manner. Such a condition would be an unconstitutional one. *See, e.g., Sherbert* v. *Verner,* 374 U.S. 398, 404 (1963).

Even if the right of access is viewed as a common law right, the extent of prospective "commercialization" should not be deemed a permissible basis for infringing that right. As the Court of Appeals stated, the fact "[t]hat at least some appellants assert this precious [common law] right in order that they might personally profit in no way diminishes their status as rightholders." 551 F.2d at 1260 n.37. To hold otherwise would tend to eviscerate the right. One may reasonably suppose that the public will be most anxious to exercise its rights of inspection and copying when a court exhibit or other court record touches on the pressing concerns of the day. But when an issue is of great public importance and interest, the natural "commercial" tendencies of the free enterprise system are most likely to come into play. If the inevitable pressures to "commercialize" information of great public interest are permitted to defeat the public's right of access, the public will be stymied at precisely those moments when its right of access should be given greatest sway; the greater the public's interest in a court record, the more potent the "overcommercialization" rationale for denying access to it. If the right of public access is grounded on the theory that information in official court records should be available to the public, the fact that some members of the public may profit in disseminating that information should be totally irrelevant.

We respectfully submit that the only proper concern of the Court in the general area of "overcommercialization" is that the tapes be made available to the entire public on a fair and equal basis and at a reasonable cost. That is the way in which the Court of Appeals interpreted Judge Gesell's opinion, 551 F.2d at 1265, and that is the only relevant concern for the courts.

CONCLUSION

Respondent Warner Communications, Inc. asserts that there is both a constitutional and a common law right to inspect and copy court records—including exhibits introduced as evidence in a criminal case. Those rights are always precious, and in the instant case, they are compelling. The tapes at issue reveal abuse of public office by some of the Nation's highest officials during Mr. Nixon's tenure as President, and the record amply demonstrates that the aural qualities of the cover-up conversations, captured only on the tapes, are crucial facts that are necessary for a full understanding of the cover-up and the ensuing trial in *United States* v. *Mitchell.* Indeed, the right of access to these tapes is reinforced by the considered legislative judgment, embodied in the Presidential Recordings and Materials Preservation Act, that there is a vital need to provide the American people with a full historical record of the abuses of power known as "Watergate."

There may be situations in which the public's right of access may be abridged in the interests of justice. This is not such a case. No one's right to a fair trial will be compromised by prompt dissemination of the tapes, and none of the values underlying the need for

confidential presidential decisionmaking will be undermined in light of the public nature and widespread distribution of the content of the tapes. Nor does Mr. Nixon assert any cognizable personal privacy or propriety interests that should preclude release of the tapes. These tapes are verbatim records of the transaction of official government business, and certainly after the decision in *Nixon* v. *Administrator of General Services* Mr. Nixon cannot validly claim that such records are "his" rather than the public's.

The courts below have exercised sound judicial discretion in holding that the public interest in an informed and enlightened public opinion mandates release of these tapes, and the Court of Appeals' decision—a narrow decision premised on particular facts unique in our history but reached under well-established principles of the common law—should be ratified by this Court.

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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